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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO),

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal district court has "ancillary" subject matter jurisdiction, after a judgment for money damages has been fully satisfied, to issue an anti-suit injunction barring foreign litigation.

2. Whether a federal district court exercising its limited authority under the treaty governing enforcement of international arbitration awards may issue an anti-suit injunction barring foreign litigation on the ground that the district court views the foreign lawsuit as seeking to relitigate matters decided in the underlying arbitration that were never considered or decided in the federal court.

3. Whether an injunction barring foreign litigation presents a grave intrusion upon principles of international comity that is justified only when necessary to protect the jurisdiction of the U.S. federal court or to further an important public policy.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties to the proceedings in the United States Court of Appeals for the Second Circuit were:

Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, now known as PT Pertamina (Persero), Respondent-Appellant;

Karaha Bodas Company, L.L.C., Petitioner-Appellee; and

Ministry of Finance of the Republic of Indonesia, Interested Party.

Pursuant to Supreme Court Rule 29.6, Petitioner PT Pertamina (Persero), formerly known as Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, states that it is wholly owned by (but a separate juridicial entity from) the Government of the Republic of Indonesia.

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PETITION FOR A WRIT OF CERTIORARI

PT Pertamina (Persero) respectfully petitions this Court for a writ of certiorari to review the judgment entered on September 7, 2007 by the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 500 F.3d 111 (2d Cir. 2007), and is reproduced in the Appendix ("App.") at 1a. The opinion of the United States

District Court for the Southern District of New York is reported at 465 F. Supp. 2d 283 (S.D.N.Y. 2006) and is reproduced in the Appendix at 47a. The judgment of the United States District Court for the Southern District of New York is unreported and is reproduced in the Appendix at 42a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 7, 2007. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, codified at 9 U.S.C. §§ 201-208, is reproduced in the Appendix at 287a.

The All Writs Act, 28 U.S.C. § 1651(a), states:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The supplemental jurisdiction statute, 28 U.S.C. § 1367(a), provides in relevant part:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy unde. Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

The full text of 28 U.S.C. § 1367 is reproduced in the Appendix at 298a.

STATEMENT OF THE CASE

The United States District Court for the Southern District of New York entered a broad anti-suit injunction against PT Pertamina (Persero) ("Pertamina") precluding it, among other things, from prosecuting a lawsuit seeking damages for fraud in the Grand Court of the Cayman Islands – or anywhere else in the world – against Karaha Bodas Company, L.L.C. ("KBC"), a Cayman Islands special-purpose corporation. The Second Circuit affirmed the anti-suit injunction in substantial part, in an opinion that conflicts with decisions of other federal circuits in no fewer than three significant respects.

The matter in which the New York district court issued the anti-suit injunction was KBC's proceeding to execute on a Texas district court's judgment

confirming an international arbitration award. When the district court issued the injunction, proceedings were otherwise concluded and the full money judgment had been paid. The court's exercise of ancillary jurisdiction to issue and maintain the injunction after satisfaction of the judgment contradicts a recent decision of the Eighth Circuit on the identical issue, *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007). *Goss* is the subject of a separate petition for certiorari that we understand is being filed with this Court.

The Texas district court judgment, upon which the New York enforcement proceeding was based, confirmed KBC's international arbitration award pursuant to a summary proceeding dictated by an international treaty. Neither district court – indeed, no U.S. court – had occasion to consider the merits of the fraud claims that Pertamina asserted in the Cayman Islands. In concluding that the narrow U.S. enforcement proceedings could be a basis for enjoining foreign litigation, the Second Circuit directly contradicted an earlier Fifth Circuit decision arising out of this dispute.

In affirming the anti-suit injunction, moreover, the Second Circuit contributed to a pervasive conflict within the circuit courts regarding the standard for enjoining foreign litigation. Such injunctions signal profound disrespect for foreign courts, and are thus an affront to vital interests of international comity. This Court should limit their use to the rarest of circumstances.

A. The Arbitration Award and the Proceedings Below

Pertamina is an Indonesian state-owned corporation charged with exploring and exploiting geothermal energy resources in Indonesia. KBC contracted with Pertamina to locate geothermal resources in West Java and to sell electricity generated thereby ("the Project"). App. 4a. The Indonesian currency collapsed in 1997, and the Government of Indonesia suspended the Project.

In the period surrounding suspension of the Project, KBC submitted to Pertamina two Notices of Resource Confirmation and a Notice of Intent to Develop (collectively, the "Notices"), which Pertamina now believes were fraudulent. The first Notice (in September 1997) purported to confirm 75 MW of geothermal resources, C.A. App. A-679 ¶¶ 33-35; the second (three months later) asserted that KBC had confirmed sufficient geothermal resources that it reasonably expected to collect 210 MW of geothermal energy, *id.* at A-878 ¶ 40.

KBC subsequently commenced international arbitration proceedings. In December 2000, a Swiss arbitral tribunal issued a Final Award in favor of KBC against Pertamina, awarding $261,166,654.92.

Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 ("New York Convention" or "Convention"), 21 U.S.T. 2517, 330 U.N.T.S. 3, codified at 9 U.S.C. §§ 201-208, a tribunal's award is not self-executing but may be enforced by the courts of any signatory jurisdiction. KBC left no stone unturned in this

regard, filing enforcement proceedings in Hong Kong, Singapore, Canada, and the United States. App. 9a.

KBC filed its United States proceeding in the U.S. District Court for the Southern District of Texas. Pertamina opposed enforcement of the award on various grounds, most of them procedural. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 294-307 (5th Cir. 2004), reproduced at App. 88a. Pertamina did not assert (because it did not then have proof) that KBC's Notices had fraudulently misrepresented the extent of geothermal resource that KBC had confirmed.

In December 2001, KBC obtained an order from the Texas court confirming the arbitration award. In February 2002, while that order was under appeal,[1] KBC filed the action below in the Southern District of New York to register the Texas judgment and commence execution proceedings. App. 10a.

The proceeding below, therefore, was limited to identifying funds held by Pertamina in New York and ordering their turnover, pursuant to the registered judgment. App. 52a-55a. The parties disputed whether Pertamina or the Government of Indonesia owned the funds within twenty-four bank accounts. Ultimately, funds were identified in New York bank accounts sufficient to cover the

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[1] The Texas district court's confirmation order ultimately was affirmed, *Karaha Bodas*, 364 F.3d 274, and this Court denied Pertamina's petition for a writ of certiorari in October 2004. *PT Pertamina (Persero) v. Karaha Bodas Co.*, 543 U.S. 917 (2004).

outstanding amount of the arbitration award. App. 63a-64a.

B. The Fifth Circuit's Decision Reversing KBC's Prior Anti-Suit Injunction

The anti-suit injunction appealed from is not the first that KBC has sought against Pertamina. Concurrent with the New York enforcement proceedings, KBC unsuccessfully pursued an anti-suit injunction in the Texas proceedings, seeking to enjoin an annulment action that Pertamina filed in Indonesia. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 359-60 (5th Cir. 2003), reproduced at App. 155a. The Texas district court granted KBC's request, preliminarily enjoining Pertamina from seeking injunctive relief in the Indonesian action. *Id.* at 362.

The Fifth Circuit reversed the anti-suit injunction. The court articulated three reasons of particular importance here: *First*, under the New York Convention, a final order enforcing an arbitration decision is "not truly a decision on the merits; rather, it is an order to enforce an award resulting from litigation elsewhere, which is not necessarily given *res judicata* effect in foreign jurisdictions." *Id.* at 372. *Second*, it is not the job of a federal court, charged only with enforcing a foreign arbitration award, "to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it." *Id.* at 369.

Third, enjoining a party in an international arbitration enforcement proceeding is especially dangerous to the comity concerns at the core of the Convention. *Id.* at 372-73.[2]

C. Pertamina Uncovers Proof of KBC's Fraud and Files Suit in the Cayman Islands.

The documents underlying Pertamina's fraud claim first came to its attention in August 2005, when Pertamina's new Singapore counsel discovered twelve boxes of KBC documents that KBC's ex-staff had sent to Pertamina in November 2002. C.A. App. A-692 ¶ 70(b); A-1109; A-1845. The documents demonstrate that KBC knew it had not proven the geothermal resource it claimed in the Notices. Indeed, the documents reveal that at the time of the September 1997 Notice, KBC could not truthfully confirm 75 MW of geothermal resources; and that no meaningful additional drilling activity occurred before the December 1997 Notices, which predicted a 210 MW facility. *See id.* at A-701-10 ¶¶ 85-113; A-1168-1206.

By August 2005, the Texas confirmation action had concluded, and the New York turnover proceeding involved merely execution of the Texas judgment. *See* App. 10a. Pertamina therefore sought to raise the fraud claim in connection with KBC's then-pending enforcement proceedings in

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[2] On March 8, 2004, Indonesia's Supreme Court determined that Indonesian courts lacked jurisdiction over the annulment action. C.A. App. A-468.

Singapore and Hong Kong. Those attempts proved unavailing because KBC dismissed its Singapore proceeding and successfully postponed its Hong Kong proceeding.[3] Pertamina therefore filed a lawsuit for fraud in the Cayman Islands, where KBC itself is incorporated and cannot complain of being sued.

In the Cayman lawsuit, Pertamina claimed that KBC committed fraud in (a) sending Pertamina the Notices, and (b) submitting the Notice of Arbitration and procuring an arbitration award predicated on fraudulent representations. Pertamina sought damages as a result. C.A. App. A-1598 ¶¶ 6-7. It also sought equitable relief, including a preliminary injunction to prevent KBC from dissipating assets and, if successful at trial, an injunction preventing further enforcement of the arbitration award because it had been "vitiated" by fraud. *Id.*

D. The Anti-Suit Injunction and the Second Circuit Decision

Rather than defend against the Cayman action on the merits, or on grounds of res judicata or collateral estoppel, KBC instead moved the New York district court on September 21, 2006 for an anti-suit injunction prohibiting Pertamina from prosecuting the Cayman action or any similar proceeding worldwide. By this time, the turnover proceedings in the district court were largely completed; this Court denied certiorari on October 2, 2006, *PT Pertamina*

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[3] On October 9, 2007, the intermediate appeals court in Hong Kong ruled against Pertamina; Pertamina has filed a notice that it will seek to appeal to Hong Kong's highest court.

(Persero) v. Karaha Bodas Co., 127 S. Ct. 129 (2006), and the district court issued final turnover orders on October 6 and November 15. Pertamina promptly complied with these orders and the judgment was fully satisfied. App. 63a-64a.

On December 8, 2006, the district court released an Opinion granting KBC's motion for a global permanent anti-suit injunction. App. 47a. The district court's final order permanently enjoins Pertamina from (among other things) pursuing its fraud claims in the Cayman Islands action or in any other court or tribunal. App. 43a-45a.

Pertamina timely appealed to the Second Circuit from the anti-suit injunction.[4] Meanwhile, the Eighth Circuit decided *Goss*, which held under analogous circumstances that a district court lacked ancillary jurisdiction to enjoin a foreign lawsuit after payment of the judgment. 491 F.3d at 368-69. The Second Circuit ordered supplemental briefing in light of *Goss*.

In an opinion dated September 7, 2007, the Second Circuit affirmed the district court's anti-suit injunction with minor modifications. Disagreeing with the Eighth Circuit, the court held that federal district courts have ancillary jurisdiction to enjoin foreign litigation even after payment of a judgment. The Second Circuit further held that, under the standard first articulated in *China Trade &*

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[4] The district court entered a stay pending appeal, requiring KBC to hold disputed funds Pertamina had paid pursuant to the final turnover orders. The Second Circuit on February 13, 2007 lifted that stay, and this Court denied Pertamina's emergency application the next day. KBC has disbursed the funds. App. 15a.

Development Corp. v. M.V. Choong Yong, 837 F.2d 33, 35-36 (2d Cir. 1987), the anti-suit injunction was appropriate. App. 19a-35a.

Characterizing the Cayman action as a challenge to the arbitration award, the court reasoned that the U.S. enforcement proceedings were "dispositive" of the issues in the Cayman lawsuit – a threshold requirement of the *China Trade* test. App. 22a. The court acknowledged that the Fifth Circuit's decision reversing KBC's prior anti-suit injunction had held that the U.S. court, acting as a secondary-jurisdiction tribunal under the New York Convention, does not have the same interest in protecting its judgments from international interference as it does in the typical case it adjudicates. App. 26a-27a. The Second Circuit sought to distinguish the Fifth Circuit's decision, however, on the ground that (a) since the Fifth Circuit's decision, additional federal judgments enforcing KBC's award had been entered, and (b) as the court saw it, the Cayman Islands has "no arguable basis for jurisdiction to adjudicate rights and obligations of the parties with respect to the [arbitration award]." App. 28a-31a.

The Second Circuit further determined that the anti-suit injunction was warranted because (a) the Cayman action interferes with the jurisdiction of the U.S. courts, (b) the Cayman action impairs the important public policy in favor of arbitration, and (c) the Cayman action is "vexatious." App. 31a-34a.

In affirming the injunction, the Court "modif[ied] it slightly to clarify that [it] has no effect on confirmation proceedings contemplated by the New York Convention in other jurisdictions." App. 41a. The Court also noted that Pertamina, were it to

identify a good-faith basis to pursue annulment litigation in Switzerland, could return to the New York district court for permission to seek such relief. *Id.* Neither "modification" permits Pertamina to pursue its affirmative damages claim for fraud.[5]

REASONS FOR GRANTING THE WRIT

This Petition presents three separate but related issues as to which the federal circuits are in conflict. These significant issues, severally or in combination, warrant certiorari.

The Eighth and Second Circuits have reached opposite conclusions regarding whether, after an award of damages has been satisfied, a federal court retains ancillary subject matter jurisdiction to enjoin proceedings. The Eighth Circuit's view is consistent with this Court's recent ancillary jurisdiction opinions: after satisfaction of the judgment, ancillary jurisdiction is lacking. The Second Circuit rejected this reasoning.

The Second Circuit's holding also conflicts with the Fifth Circuit's decision regarding the propriety of a New York Convention enforcement court issuing an anti-suit injunction. Enforcement proceedings under the Convention are summary in nature, and sharply

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[5] The anti-suit injunction required Pertamina to dismiss its Cayman action. The Second Circuit denied a stay, and the Cayman action accordingly has been dismissed. In the event the Court grants certiorari and the anti-suit injunction ultimately is reversed, Pertamina may seek leave to re-file its Cayman action or may file suit elsewhere to pursue its fraud claim.

restrict the grounds on which a defendant can object. Nevertheless, and despite the Fifth Circuit reversing an anti-suit injunction in fundamentally indistinguishable circumstances, the Second Circuit treated the enforcement and execution proceedings in this case as judgments on the merits.

Finally, the Second Circuit's decision contributes to the widespread confusion among the circuit courts regarding the proper standard to be applied in considering whether to issue an anti-suit injunction. Nine circuits have articulated various standards, which fall into at least three discrete and irreconcilable approaches. The circuits' respective tests differ most dramatically as to how much respect is afforded to the interest of international comity.

This Court should swiftly resolve these disagreements. As the world economy grows, international litigation is becoming both more sophisticated and widespread. Judging by the many recent court decisions, *see infra*, litigants are increasingly turning to preemptive anti-suit injunctions. Yet, as the global marketplace increases in size, the need to respect foreign tribunals must keep pace. This is nowhere more evident than in lawsuits arising out of the New York Convention. U.S. litigants and U.S. courts rely on the mutual goodwill among signatory nations to adjudicate disputes fairly and respect previous rulings.

No less pressing is the need to ensure that the limits of federal subject matter jurisdiction are well understood and consistently applied. The Second Circuit's decision greatly expands ancillary jurisdiction by allowing federal courts to continue exercising control over parties whose business before

the courts has concluded – and consequently, to exercise control over proceedings in foreign courts. Ancillary jurisdiction, as this Court's prior decisions make clear, should be limited to what is necessary for the court's function. The post-judgment anti-suit injunction entered by the district court most assuredly was not within the narrow range of situations for which ancillary jurisdiction is reserved.

In short, a writ of certiorari should be granted to clarify the breadth of post-judgment ancillary jurisdiction and to determine the standards under which a district court may enjoin foreign litigation.

I. THE SECOND AND EIGHTH CIRCUITS ARE IN CONFLICT REGARDING THE "ANCILLARY" JURISDICTION OF A DISTRICT COURT TO ENJOIN PROCEEDINGS AFTER SATISFACTION OF A JUDGMENT.

The Second Circuit's decision in this case squarely conflicts with the Eighth Circuit's decision in *Goss*, 491 F.3d 355, on an important question of federal subject matter jurisdiction. In *Goss*, which we understand is before this Court on petition for certiorari, the Eighth Circuit reversed a district court's anti-suit injunction against a foreign action that the court perceived to be a threat to its jurisdiction. The Eighth Circuit held that "the district court retained ancillary enforcement jurisdiction [only] *until* satisfaction of the judgment," *id.* at 365, and because the judgment had been paid, the anti-suit injunction could not stand, *id.* In contrast, the Second Circuit held, after specifically

considering *Goss*, that the New York district court had ancillary jurisdiction to restrain foreign litigation even after Pertamina had paid the judgment. App. 37a-38a. This Court should grant certiorari to resolve this circuit split and to decide the important question of whether post-judgment anti-suit injunctions are within federal courts' ancillary subject matter jurisdiction.

A. The Eighth Circuit Holds that Ancillary Jurisdiction Does Not Extend to Post-Judgment Anti-Suit Injunctions.

In *Goss*, a United States company obtained a damages judgment against a Japanese manufacturer under the Antidumping Act of 1916, 15 U.S.C. § 72 (repealed 2004). 491 F.3d 356. The Japanese company then informed the district court that it intended to file suit in Japan under a "claw back statute" under which the company could recover as damages the amount of any judgment against it under the U.S. Antidumping Act. The United States company sought an anti-suit injunction from the federal district court. *Id.* at 359. As in this case, the prevailing party in *Goss* argued that the foreign action would undo the effects of the domestic judgment it had obtained. *Id.* The district court agreed, holding that the Japanese action was "a direct attack on this court's judgment in favor of Goss and a frontal assault on the jurisdiction of [the] court and the federal judiciary as a whole." *Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 435 F. Supp. 2d 919, 929 (N.D. Iowa 2006).

The Eighth Circuit reversed. The court first observed that while anti-suit injunctions are authorized by the All Writs Act, 28 U.S.C. § 1651(a), "the Act does not create an independent source of federal jurisdiction." 491 F.3d at 364. Prior to payment of the judgment, the *Goss* court reasoned, the district court had jurisdiction to enjoin the Japanese company from pursuing the foreign litigation. *Id.* at 365. Once the judgment was paid, however, "the jurisdictional circumstances . . . changed because there [was] no longer an outstanding judgment to protect." *Id.* at 368. The *Goss* court concluded that "[n]either the All Writs Act nor the court's ancillary enforcement jurisdiction provides the district court with a separate source of jurisdiction . . . under these circumstances." *Id.* at 365. The Eighth Circuit relied on this Court's decision in *Peacock v. Thomas*, 516 U.S. 349 (1996), which "caution[ed] against the exercise of jurisdiction over proceedings that are entirely new and original, or where the relief [sought is] of a different kind or on a different principle than that of the prior decree." *Id.* at 358 (internal quotation marks and citation omitted).

B. The Second Circuit's Decision Squarely Disagrees with the Eighth Circuit's, Creating a Circuit Split on a Significant Issue of Subject Matter Jurisdiction that This Court Should Resolve.

The decision below specifically addressed, at some length, the Eighth Circuit's *Goss* decision – and unambiguously disagreed. App. 37a-38a. Recognizing that, as in *Goss*, the district court's judgment had been paid and its proceedings were at an end, the Second Circuit nonetheless upheld the anti-suit injunction, reasoning that "federal courts have continuing jurisdiction, grounded in the concepts of *res judicata* and collateral estoppel, to enjoin a party properly before them from relitigating issues in a non-federal forum that were already decided in federal court." App. 38a. The Second Circuit emphasized that "[t]his source of jurisdiction remains *even after a judgment has been satisfied* . . . ." *Id.* (emphasis added). The court made no attempt to reconcile its holding with *Goss*, and indeed, they are irreconcilable.

The present case is a perfect opportunity for this Court to resolve this clear circuit split on an issue of critical importance to the federal courts. As the number of lawsuits waged in multiple countries grows with the ever-expanding global economy, U.S. courts are likely to face increasingly complicated litigation postures that raise thorny jurisdictional issues. Just so here: the Eighth and Second Circuits faced the identical jurisdictional question within months of each other and reached opposite conclusions.

In addition to its international character, this case warrants certiorari to address the scope – if any – of a court's ancillary jurisdiction after a judgment has been satisfied. Ancillary jurisdiction is a species of subject matter jurisdiction, which goes to the heart of the judicial power. *See Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884). The presence of jurisdiction is the "first and fundamental question'" in any action or appeal, and is an issue that a federal court is "'bound to ask and answer for itself, even when not otherwise suggested." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). In part because of the central importance of subject matter jurisdiction, the scope of ancillary jurisdiction is a recurring and confounding problem in the lower federal courts. Indeed, the Second Circuit below commented that the caselaw on the topic was "hardly a model of clarity." App. 38a (quoting *Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir. 2006)); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994) ("The doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise . . . ."). For these reasons, this Court's guidance is especially necessary to "carefully guard[ ]" against the federal courts' expansion of their own power. *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951).

C. The Second Circuit's Judgment Is Incorrect and Should Be Reversed.

The district court lacked ancillary jurisdiction to maintain its anti-suit injunction. Federal courts are

to "presume[] that a cause lies outside this limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (citation omitted). This Court accordingly has limited ancillary jurisdiction to two instances: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-80 (citations omitted). In this case, the district court's injunction cannot be justified on grounds of "factual[] interdependen[ce]" because this basis for ancillary jurisdiction applies only prior to judgment. *Peacock*, 516 U.S. at 355 ("once judgment was entered," the ability of a single court to resolve "factually intertwined issues vanished").

Following satisfaction of a judgment, therefore, ancillary jurisdiction to issue an anti-suit injunction may be justified only if the injunction enables a district court to "function successfully." This basis for ancillary jurisdiction too is exceedingly narrow and does not extend to the anti-suit injunction in this case. In *Kokkonen*, the Court held that there was no ancillary jurisdiction over an alleged violation of a settlement agreement after the district court had dismissed the case. 511 U.S. at 380-81. In *Peacock*, the Court found no ancillary jurisdiction over claims brought by a judgment creditor to collect against an officer and shareholder of the judgment debtor who had transferred the assets to himself. 516 U.S. at 356-59. When, in the past, this Court has found ancillary jurisdiction to enjoin a proceeding following entry of judgment, the judgments were ongoing orders in need of continued protection. *See Dugas v.*

Am. Sur. Co. of N.Y., 300 U.S. 414, 428 (1937) (modifying closely related injunction to enjoin related proceeding); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) (protecting bankrupt person from subsequent suit regarding debt for which he received bankruptcy protection); *Dietzsch v. Huidekoper*, 103 U.S. 494, 497 (1880) (following equitable suit in replevin assigning ownership of property, enjoining attempt to recover "the equivalent to an actual return of the replevied property").

In the recent *Kokkonen* and *Peacock* decisions, this Court emphasized that ancillary jurisdiction extends only to matters truly necessary to protect the court's authority to manage the proceedings before it. In rejecting jurisdiction to adjudicate violation of a settlement agreement, *Kokkonen* limited enforcement jurisdiction to "what courts require in order to perform their functions." 511 U.S. at 380. Because the agreement was not incorporated in the district court's dismissal order, the order was "in no way flouted or imperiled by the alleged breach of the settlement agreement." *Id.* The *Peacock* Court observed that ancillary jurisdiction over supplemental proceedings was strictly limited. "Our recognition of these supplementary proceedings has not . . . extended beyond attempts to execute, or to guarantee eventual executability of, a federal judgment." 516 U.S. at 357. In so holding, the *Peacock* Court recognized that this might mean that some judgments would not be paid. *Id.* at 359 ("The Rules cannot guarantee payment of every federal judgment."). But as long as a federal court "protect[s] a judgment creditor's ability to execute on a judgment, the district court's authority is adequately preserved." *Id.*

These recent decisions are consistent with 28 U.S.C. § 1367, which confers supplemental jurisdiction over disputes that "form part of the same case or controversy under Article III of the United States Constitution" as the claims for which there is original jurisdiction. *Id.* This Court recently emphasized that, for Article III purposes, a case or controversy must "admi[t] of *specific relief* through a decree of a *conclusive character*." *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) (emphases added) (quotation omitted). When a judgment calls for money damages, and that judgment is paid, the case or controversy is concluded. Any further dispute between the parties, especially one seeking an entirely different kind of relief, such as an anti-suit injunction, is not part of the same case or controversy. *See Peacock*, 516 U.S. at 358 (expressing caution for exercises of ancillary jurisdiction over subsequent disputes premised on a different principle or seeking different forms of relief).

Applying these precedents to this case, the district court lacked ancillary jurisdiction. After adjudicating a narrow proceeding regarding the ownership of certain bank accounts, the district court ordered the turnover of money damages. The judgment included no ongoing injunctive relief, and the district court's judgment accordingly was fully effectuated when the money was paid. *See Goss*, 491 F.3d at 368 n.9 (payment of a money judgment ends need for ancillary enforcement jurisdiction). The district court itself recognized that the judgment was "finally satisfie[d]." App. 63a. Accordingly, the district court's turnover order would not be "flouted or imperiled," *Kokkonen*, 511 U.S. at 380, by

Pertamina's Cayman lawsuit for damages. In contrast to the Second Circuit below, the Eighth Circuit in *Goss* correctly concluded that, having taken the steps to ensure that the judgment was satisfied, the district court's ancillary enforcement jurisdiction was at an end and the anti-suit injunction was improper.

II. THE SECOND AND FIFTH CIRCUITS ARE IN CONFLICT REGARDING ANTI-SUIT INJUNCTIONS ISSUED BY COURTS EXERCISING SECONDARY JURISDICTION UNDER THE NEW YORK CONVENTION.

The Second Circuit held that the federal judgments at issue – the Texas district court's confirmation of the arbitral award and the New York district court's enforcement of it – were "dispositive" of Pertamina's Cayman Islands fraud claims and justified an anti-suit injunction. App. 22a. The court so held even though the Texas and New York district courts never heard or decided the merits of those claims.[6] *See id.* The Second Circuit reasoned,

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[6] The Second Circuit noted that the Fifth Circuit, in affirming the Texas district court's confirmation order, considered a claim by Pertamina that the arbitration award was procured by fraud. App. 23a. That claim had nothing to do with Pertamina's fraud claim presented in the Cayman Islands. Rather, the Fifth Circuit examined whether KBC's failure to disclose a political insurance policy provided a basis for refusing to enforce the award as contrary to public policy under Article V(2)(b) of the Convention. *Karaha Bodas*, 364 F.3d at 306-07. That court never considered the fraud allegations relating to KBC's Notices raised in the Cayman proceeding.

because Pertamina's fraud claims were (so it found) decided in the Swiss arbitration,[7] and the arbitral ruling was enforced by the U.S. federal courts, those courts had "actually decided" the claims raised in the Cayman action. *Id.* The Second Circuit thus regarded the federal courts' confirmation and enforcement orders under the Convention as equivalent to a federal adjudication on the merits of all of the issues in the underlying arbitral proceeding – even issues that the federal courts never heard or decided.

The Second Circuit's holding directly conflicts with the Fifth Circuit's conclusion, in the prior proceeding between these parties, that the Texas district court's anti-suit injunction was improper in light of the court's limited role under the New York Convention. *See Karaha Bodas*, 335 F.3d 357. The Fifth Circuit reasoned that confirmation and enforcement proceedings in courts of secondary jurisdiction are *not* judgments on the merits, are not necessarily entitled to res judicata effect, and do not imbue a federal court with the same interest in protecting its judgments as would the typical case. *Id.* at 366-73. In addition to creating a circuit conflict, the Second Circuit's decision represents an unprecedented assertion of federal authority in the international arbitration context, an arena in which anti-suit injunctions are particularly inappropriate

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[7] This issue was vigorously contested below, and Pertamina believes the Second Circuit erroneously determined that Pertamina's fraud claims were decided in the Swiss arbitration. App. 23a. While Pertamina argued that KBC's damages claims were grossly inflated, it did not assert an affirmative claim for fraud, nor did it then possess the documents that underlie its claims in the Cayman action. App. 50a-51a; C.A. App. A-1636.

and offensive to international comity. As this Court has emphasized, "[t]he utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985).

A. The Fifth Circuit Held that an Anti-Suit Injunction Was Inappropriate in Light of the Limited Role of a U.S. Court Acting as a Secondary Enforcement Jurisdiction Under the Convention.

The Fifth Circuit typically applies a permissive standard for issuing anti-suit injunctions against foreign proceedings. *See infra*, part III.B; *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626-27 (5th Cir. 1996). It applies a very different standard, however, to anti-suit injunctions issued from Convention enforcement proceedings. In *Karaha Bodas*, an earlier proceeding between these parties described at pp. 7-8, *supra*, the Fifth Circuit properly looked to the structure of the Convention to determine whether to enjoin Pertamina's Indonesian annulment proceeding. *See* 335 F.3d at 368.

First, the Fifth Circuit noted that the Convention "assign[s] different roles to national courts to carry out the aims of the treaty." *Id.* A "primary jurisdiction" is one in which, or under the law of which, an arbitral award is made; a "secondary jurisdiction" is one in which recognition and

enforcement of an award is sought. *Id.* at 364. To establish a *prima facie* basis for enforcement in a secondary jurisdiction, the recipient of the award need only present the authenticated award and the original arbitration agreement to the enforcement court pursuant to Article IV of the Convention. *Id.* at 368. Once the litigant meets that requirement, the court of secondary jurisdiction *must* enforce the award unless the party opposing enforcement establishes one of seven narrow grounds to refuse enforcement. 9 U.S.C. § 201, note, Art. V; *see Karaha Bodas*, 335 F.3d at 368; *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 307 (3d Cir. 2006) (secondary jurisdiction court's role "is limited – it must confirm the award unless one of the grounds for refusal specified in the Convention applies"). "[T]he efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal . . . ." *Mitsubishi Motors*, 473 U.S. at 638.

Second, the Fifth Circuit observed that the Convention contemplates (as occurred here) that there will be multiple enforcement and/or nullification actions in jurisdictions worldwide, and courts considering the award are entitled "to conduct their own independent enforcement analyses." *Karaha Bodas*, 335 F.3d at 370. A district court's judgment under the Convention merely holds that the arbitration award is enforceable within the *United States*. *See id.* at 370. Accordingly, the integrity of a U.S. court's enforcement order is not threatened when other courts "address[] the same or similar legal bases against enforcement and confirmation." *Id.* at 370. For this reason, the decisions of the enforcement court are "not

necessarily given *res judicata* effect in foreign jurisdictions" because such decisions "only enforce[], or refuse[] to enforce, awards arbitrated elsewhere." *Id.* at 372 & n.59.

Accordingly, the Fifth Circuit reasoned, an anti-suit injunction issued by a court of secondary jurisdiction is "likely . . . to demonstrate an assertion of authority not contemplated by the . . . Convention." *Id.* at 373. Because of the structure of the Convention, an "order to enforce an award resulting from litigation elsewhere" is "*not truly a decision on the merits.*" *Id.* at 372 (emphasis added); *accord Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178 (3d Cir. 2006) (distinguishing enforcement of arbitral award under the Convention from an "adjudication on the merits").

B. The Second Circuit Held that It Was Appropriate To Issue an Anti-Suit Injunction To Protect the District Court's Enforcement of the Same New York Convention Arbitral Award.

Though acknowledging that the United States was operating as a secondary jurisdiction under the Convention, the Second Circuit nevertheless treated the district courts' confirmation and enforcement as decisions on the merits justifying an extraordinary anti-suit injunction. App. 22a-23a.[8] This conclusion

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[8] The Second Circuit modified the injunction so that it did not apply to litigation in Switzerland or confirmation proceedings under the Convention. *See* App. 28a-29a. This limitation in no way reconciles the court's ruling with the Fifth

is inconsistent with the limited function the U.S. district courts were allowed to and did perform – ensuring that the Article IV paperwork requirements were met and addressing Pertamina's objections on the limited grounds set forth in Article V.[9]

The Second Circuit's decision is directly in conflict with the Fifth Circuit's. While the Second Circuit treated the enforcement decision as a judgment on the merits that had "actually decided" any issues presented in the arbitration, *id.*, the Fifth Circuit reached the opposite conclusion and found that an enforcement judgment is not threatened even by a direct challenge to the underlying arbitration in a foreign jurisdiction. *Karaha Bodas*, 335 F.3d at 370. This Court's guidance is necessary to resolve this conflict over whether and under what circumstances a court of secondary jurisdiction can exercise its equitable authority to issue an anti-suit injunction against a foreign proceeding.

The Second Circuit suggested two bases for distinguishing the Fifth Circuit's contrary decision. Neither resolves the conflict. First, the Second Circuit suggested that the procedural posture of the two cases differed. *See* App. 28a. In the Fifth Circuit

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Circuit's, as the Second Circuit unquestionably would have enjoined the Cayman lawsuit even if it had been styled an "annulment" action, like the Indonesian action at issue in the Fifth Circuit case. Indeed, the New York district court's anti-suit injunction, as affirmed by the decision below, by its plain terms *would* enjoin an annulment action in the Cayman Islands or Indonesia. App. 43a-45a.

[9] The Fifth Circuit, in its later opinion affirming enforcement, noted that "[i]t is clear that the district court had secondary jurisdiction and considered *only whether to enforce the Award*." *Karaha Bodas*, 364 F.3d at 287 (emphasis added).

case, it noted, the Texas district court had only confirmed the award, whereas the New York district court had issued an enforcement order (based on that confirmation) for Pertamina to turn over $319 million. *Id.* The Second Circuit did not explain why a turnover order speaks more to the merits of the underlying arbitration than does a confirmation order; if anything, the New York proceeding had even less to do with the merits than did the Texas proceeding. In any event, the Fifth Circuit's ruling, that an "order to enforce an award resulting from litigation elsewhere" is "*not truly a decision on the merits*," *Karaha Bodas*, 335 F.3d at 372 (emphasis added), is equally applicable to either the New York or Texas proceeding.

Second, the Second Circuit distinguished the Fifth Circuit's decision on the ground that Pertamina had a "colorable argument" that the enjoined Indonesian proceedings may have been permissible under the Convention, while the Cayman proceeding enjoined by the New York district court was not brought under the auspices of the Convention. App. 29a-30a. But it is evident from the Fifth Circuit opinion that the "colorable argument" was not a factor in its decision. It held that the Indonesian action did not impinge on the Texas district court's confirmation and enforcement jurisdiction, even if that action were not authorized by the Convention, and even if that action were otherwise improper:

> [E]ven if the Indonesian court acted wrongly in its decision to annul the Award as a court of purported primary jurisdiction under the . . . Convention, we need not directly address the

> propriety of that court's injunction and annulment. Contrary to the district court's conclusions, legal action in Indonesia, regardless of its legitimacy, does not interfere with the ability of U.S. courts, or courts of any other enforcement jurisdictions for that matter, to enforce a foreign arbitral award.

Karaha Bodas, 335 F.3d at 372.

C. This Court Should Grant Review To Resolve This Conflict and To Clarify the Circumstances (If Any) When an Enforcement Court May Enjoin Foreign Litigation.

While the conflict between the Second and Fifth Circuits arises from the present dispute, the significance of the courts' disagreement extends beyond this matter and affects all instances in which courts of secondary jurisdiction operating under the Convention consider anti-suit injunctions. Under the Second Circuit's decision, a court issuing a post-judgment order of confirmation or enforcement, following very limited review of the underlying arbitration, nevertheless can and should protect that order against foreign lawsuits as its own judgment on the merits affirming all aspects of the underlying arbitration. In the Fifth Circuit, by contrast, such a court must recognize its limited role under the Convention and, accordingly, must refrain from interfering with foreign proceedings pertaining to the arbitration. This Court should grant certiorari to

clarify the role of a court of secondary jurisdiction and the circumstances under which such a court can enjoin foreign litigation.

The Second Circuit's approach permits U.S. courts of secondary jurisdiction to impose their views on other courts worldwide, who otherwise would be empowered, and fully competent, to reach their own conclusions about the claims before them. This result conflicts with the narrow review power assigned to a court of secondary jurisdiction under Article V of the Convention, which requires that "substantive review at the award-enforcement stage remain minimal." *Mitsubishi Motors*, 473 U.S. at 638.

III. THE CIRCUITS ARE IN CONFLICT REGARDING THE PROPER STANDARD FOR ISSUING FOREIGN ANTI-SUIT INJUNCTIONS.

The decision below reaffirmed the Second Circuit's *China Trade* standard, which recognizes that anti-suit injunctions "effectively restrict[] the jurisdiction of the court of a foreign sovereign," and that, therefore, such injunctions must be "used sparingly" in due regard for international comity, *China Trade*, 837 F.2d at 35-36 (internal quotation marks omitted). *See* App. 16a-17a. Under this standard, the commencement of a foreign proceeding between the same parties "does not, without more, justify enjoining a party from proceeding in the foreign forum." *China Trade*, 837 F.2d at 36. Rather, the court first should consider whether the two actions share the same parties and whether the

U.S. action is "dispositive" of the foreign proceeding; if so, the court then should examine five factors in determining whether to issue an injunction. App. 16a-17a.

The Second Circuit's decision contributes to a recognized and substantial conflict among the circuits,[10] important to international commerce and foreign relations, regarding the standard under which a U.S. federal court may enjoin a non-U.S. lawsuit. The Second Circuit, like the D.C., Third, Sixth, and Eighth Circuits (and, to a lesser extent, the First Circuit), recognizes that an anti-suit injunction, in and of itself, impairs international comity. Its standard is fundamentally more restrictive than those circuits, including the Fifth, Seventh, and Ninth Circuits, that conclude that equitable factors such as the vexatiousness and oppressiveness of duplicative foreign litigation, which are likely to be present in any parallel proceeding, may be sufficient to override comity concerns.

The Second Circuit's standard is far broader, however, than the standard in the Third, Sixth and Eighth Circuits, because it considers such equitable factors, whereas these most restrictive circuits permit anti-foreign suit injunctions only when necessary to protect the jurisdiction of the U.S. court or to prevent evasion of an important public policy. Under that restrictive standard, the anti-suit

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[10] *See, e.g., Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17-18 (1st Cir. 2004) (describing circuit split).

injunction against Pertamina in this case should not have issued.

In all, nine federal circuits have weighed in on the proper standard for foreign anti-suit injunctions. They have applied fundamentally inconsistent standards, and reached fundamentally inconsistent results, in an area of great significance to the role of U.S. courts on the international stage. Absent review by this Court, this longstanding and intractable divergence will persist, and courts and litigants worldwide will remain uncertain as to the circumstances under which a U.S. court may enjoin foreign proceedings.

A. Six Circuits Apply Restrictive Standards of Varying Degrees.

A majority of the circuits holds that anti-suit injunctions should issue only in the rarest and most compelling circumstances. These courts emphasize that, even though such injunctions operate only on the parties, "they effectively restrict the foreign court's ability to exercise its jurisdiction," and thus necessarily implicate international comity. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984).

1. Three circuits apply the most restrictive test, considering only whether the foreign lawsuit threatens federal jurisdiction or impairs an important public policy.

Within this majority, the Sixth, Eighth, and Third Circuits are more restrictive than the others. The Sixth Circuit considers "*only* two factors" – protecting jurisdiction and important public policies of the forum – in determining whether an injunction may issue. *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992) (emphasis added). Similarly, the Eighth Circuit recently decided that the standard "should focus on (1) whether [the foreign action] . . . prevents United States jurisdiction or threatens a vital public policy, and (2) whether the domestic interests outweigh concerns of international comity." *Goss*, 491 F.3d at 361 n.4. The Third Circuit, while not expressly stating that those two factors are exclusive, has not recognized any other grounds that could, standing alone, justify restraining foreign litigation. *See Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 127-29 (3d Cir. 2002); *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160-61 (3d Cir. 2001).

2. Three circuits – including the Second Circuit below – also consider other equitable factors.

In contrast, the D.C., Second, and First Circuits, in varying degrees, permit consideration of other

factors. Still, all three courts apply a strong presumption against anti-suit injunctions.

The D.C. Circuit holds that "[t]he equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether . . . the injunction is required to prevent an irreparable miscarriage of justice." *Laker Airways*, 731 F.2d at 927. Although it considers factors like preventing duplicative litigation and inconsistent adjudications, the court has noted that "[t]hese and other factors . . . do not usually outweigh the importance of permitting foreign concurrent actions." *Id.* at 928-29. The Second Circuit, though it recognizes that interference with jurisdiction and the forum's public policies assume "greater significance," has identified three other relevant considerations: whether the foreign action is vexatious; results in delay, inconvenience, expense, inconsistency, or a race to judgment; or prejudices "other equitable considerations." App. 16a-17a.

The First Circuit subscribes to the restrictive approach, but in a limited fashion, finding that it "evinces a certain woodenness." *Quaak*, 361 F.3d at 18. Adopting a "traditional approach," it holds that a court should presume that comity considerations prohibit an anti-suit injunction, but should consider "all the facts and circumstances" to determine whether that presumption is rebutted. *Id.* at 18-19.

Thus, even among those circuits that recognize the need for deference to foreign jurisdiction in all but the narrowest of circumstances, there is significant variation regarding how narrow that set of circumstances is.

B. The Fifth, Seventh, and Ninth Circuits Have Adopted a Permissive Standard.

The Fifth, Seventh, and Ninth Circuits do not require interference with jurisdiction or important public policies, and instead hold that factors relating to the duplication of the parties and issues, such as vexatiousness of multiple litigation, inconvenience, and expense, may be sufficient to justify an anti-suit injunction. *See Kaepa*, 76 F.3d at 626-27; *Philips Med. Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 604-05 (7th Cir. 1993); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981).

The Ninth Circuit inquires whether any of four factors it considers "instructive" (whether the foreign litigation frustrates a policy of the forum, is vexatious or oppressive, threatens the forum court's jurisdiction, or prejudices other equitable considerations) is present, and, if so, examines whether an injunction's "impact on comity is tolerable." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 990-91 (9th Cir. 2006); *see also Seattle Totems*, 652 F.2d at 856 (enjoining Canadian litigation on bases of delay, inconvenience, expense, and potentially inconsistent rulings). Similarly, the Fifth Circuit focuses primarily on whether the parallel nature of the two proceedings results in "inequitable hardship" or frustrates speedy and efficient adjudication. *See Kaepa*, 76 F.3d at 626-27. Further, the Fifth Circuit has required a showing that an anti-suit injunction "actually threatens"

relations with the country where litigation is enjoined before comity considerations override the determination that the parallel litigation is vexatious. *Id.* at 627.

The Seventh Circuit "incline[s] toward the laxer standard" applied by the Fifth and Ninth Circuits, under which an anti-suit injunction can issue based on "nothing more than a duplication of the parties and the issues." *Bruetman*, 8 F.3d at 605-06. Like the Fifth Circuit, the Seventh Circuit presumes that the injunction will *not* impair international comity unless the opposing party offers "some indication that the issuance of an injunction really would throw a monkey wrench, however small, into the foreign relations of the United States." *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir. 1993).

C. Under a Proper Application of a Restrictive Standard, the Anti-Suit Injunction in This Case Cannot Stand.

Applying the standard articulated by the Sixth, Eighth and Third Circuits, the district court's anti-suit injunction against Pertamina should be reversed. The Second Circuit incorrectly found that the threat-to-jurisdiction, public policy, and "vexatiousness" factors supported the anti-suit injunction in this case, and, in so doing, took a more expansive view of those factors than earlier Second Circuit decisions and other circuits have.

The Second Circuit reasoned that Pertamina's Cayman action for fraud interfered with the federal

courts' jurisdiction because it sought to recover the same funds that the district court had ordered turned over to KBC. On the contrary, once the funds were turned over, the district court's jurisdiction had been fully satisfied and the district court's enforcement process had concluded.

Courts typically have found interference with jurisdiction of a level supporting an anti-suit injunction when the foreign court threatened to prevent the domestic court from rendering judgment or to carve out exclusive jurisdiction. *See, e.g.*, *Quaak*, 361 F.3d at 20 (foreign action sought to "thwart[] the very discovery that the district court . . . deemed essential"); *China Trade*, 837 F.2d at 36-37 (anti-suit injunction may be appropriate to protect jurisdiction when foreign court is "attempting to carve out exclusive jurisdiction over the action," such as by "attempt[ing] to enjoin the [U.S.] proceedings" or seeking "to prevent the [district court] from exercising its jurisdiction over th[e] case"). In contrast, requesting relief from a foreign court, even where the same relief was not sought or was denied in the domestic court, is not a jurisdictional threat. *See Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1214 (D.C. Cir. 1989) (litigant's ability to repair to a foreign court with a lower standard "does not represent an evasion of forum law and policy that justifies injunctive relief") (internal quotation marks omitted); *Gau Shan*, 956 F.2d at 1356 ("The possibility that a holding of a Hong Kong court might permit Bankers Trust to gain control of Gau Shan is not a threat to the jurisdiction of the United States courts . . . ."); *see also Goss*, 491 F.3d at 367 ("Although [the foreign suit] understandably is

objectionable to Goss, it does not threaten United States jurisdiction . . . .").

The Second Circuit further found that the Cayman action impairs the strong public policy in favor of international arbitration. Quite the contrary, as discussed above, it is the anti-suit injunction in this case that undermines the New York Convention's international arbitration regime. When acting as courts of secondary jurisdiction, with limited enforcement functions under the Convention, U.S. courts should be particularly hesitant to restrain foreign litigation to "protect" their judgments. *See Karaha Bodas*, 335 F.3d at 370. And, if the Cayman lawsuit truly were improper relitigation of the arbitration, the Cayman court would be perfectly capable of so deciding, based on applicable res judicata principles.

In addition to its erroneous application of the threat-to-jurisdiction and public policy factors, the Second Circuit also relied on a third factor – "vexatiousness" – in affirming the anti-suit injunction. Had it applied the more restrictive standard of the Sixth, Eighth and Third Circuits – which does not recognize "vexatiousness" as a ground for an anti-suit injunction – it might well have reached a different result. In any event, Pertamina's Cayman Action was not vexatious. Pertamina sought to raise its fraud allegations in appropriate fora soon after learning of them, pp. 8-9, *supra*. And while the Second Circuit suggested that Pertamina should have raised its fraud claim in the United States, instead of the Cayman Islands, *see* App. 33a-34a, there was no requirement that Pertamina do so,

and there is nothing vexatious about suing a litigant in its home jurisdiction.

D. The Circuit Split Generates Unpredictability in International Commerce and Increases the Likelihood that Foreign Courts Will Enjoin U.S. Litigation.

Over twenty years ago, the D.C. Circuit observed that "[t]here are no precise rules governing the appropriateness of antisuit injunctions." *Laker Airways*, 731 F.2d at 927. Today, that remains true and, beyond the lack of "precise rules," persistent disagreement about the standard pervades the case law on anti-suit injunctions.

The circuit split has genuine consequences for international commerce and relations. First, it injects unpredictability into international commerce, which "depends in no small part on the ability of merchants to predict the likely consequences of their conduct in overseas markets." *Gau Shan*, 956 F.2d at 1355. A foreign entity doing business in the United States, and subjecting itself to *in personam* jurisdiction, has little ability to predict whether it might be enjoined from litigation in its own country, or elsewhere, on the basis of a parallel U.S. suit.

Second, the lack of a uniform policy that duly regards comity likely increases the willingness of other sovereigns to enjoin litigants from prosecuting U.S. actions, absent any assurance that our courts would exercise their injunctive authority sparingly. This, in turn, increases the likelihood that both the foreign court and the United States court will issue

injunctions, such that an "undesirable stalemate" in which both actions are paralyzed will occur, *Gau Shan*, 956 F.2d 1355, or that one court will disregard the injunction of the other. *Cf. Dependable Hwy. Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067-69 (9th Cir. 2007) (refusing to stay a litigation that was enjoined pursuant to an English court's anti-suit injunction). The absence of clear guidance at a national level therefore debilitates cooperation and reciprocity with foreign courts exercising concurrent jurisdiction.

This Court should resolve this enduring conflict by articulating a single standard for anti-suit injunctions, one that gives due regard to the fundamental principle of comity to non-U.S. tribunals. In addition to eliminating circuit-dependent disparity in outcomes, such a standard will promote predictability and stability in international commercial transactions and will encourage foreign jurisdictions to exercise similar restraint in considering whether to enjoin U.S. litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

KARAHA BODAS COMPANY, L.L.C., *Petitioner-Appellee*,

v.

PERUSAHAAN PERTAMBANGAN DAN GAS BUMI NEGARA, *Respondent-Appellant*,

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA, *Interested-Party*.

Docket No. 07-0065-cv

Argued: May 21, 2007
Decided: Sept. 7, 2007

Craig D. Singer Williams & Connolly LLP, Washington, DC, (Henry Weisburg, Shearman & Sterling LLP, New York, NY; David E. Kendall, Thomas J. Roberts, Katherine M. Turner, and John S. Williams, Williams & Connolly LLP, Washington, DC, on the brief), for Respondent-Appellant.

Christopher S. Dugan (James E. Berger, Danielle W. Pierce, and Kaycee Sullivan, on the brief), Paul, Hastings, Janofsky & Walker LLP, New York, NY, for Petitioner-Appellee.

Before: WALKER and CABRANES, Circuit Judges, and BERMAN,* District Judge.

JOSÉ A. CABRANES, Circuit Judge:

This case requires us to consider the circumstances under which a federal court may enjoin foreign judicial proceedings that threaten to undermine federal judgments confirming and enforcing a foreign arbitral award. The United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) enjoined appellant Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") from pursuing foreign litigation that would undermine federal judgments enforcing a foreign arbitral award that appellee Karaha Bodas Company, L.L.C. ("KBC") had obtained in Switzerland and enforced in the United States pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention" or "Convention"), *implemented at* 9 U.S.C. §§ 201-208. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 465 F.Supp.2d 283 (S.D.N.Y.2006) ("*District Court Opinion*"). The District Court issued the anti-foreign-suit injunction upon learning that Pertamina had initiated a suit in the Cayman Islands that sought, *inter alia,* to "vitiate" the foreign arbitral award and obtain return of funds that had been paid

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* The Honorable Richard M. Berman, United States District Judge for the Southern District of New York, sitting by designation.

over pursuant to the award.

Pertamina argues on appeal that the District Court used the wrong legal standard to determine whether an anti-foreign-suit injunction should issue against it and that, under the proper legal standard, the injunction should not have been granted. Pertamina also argues that, in any event, the District Court lacked jurisdiction to maintain the injunction once the federal money judgment against it was satisfied.

Although we find that the District Court did not apply the correct legal standard, we affirm its judgment with minor modifications. We conclude that: (1) the test set forth in *China Trade & Development Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir.1987), applies to the anti-suit injunction; (2) the injunction was justified under the *China Trade* test; and (3) the District Court maintains jurisdiction to protect the federal judgments even after the money judgment against appellant was satisfied. We also modify the scope of the injunction to clarify that the injunction does not prohibit foreign confirmation proceedings contemplated by the New York Convention.

The dispute between the parties has been litigated extensively in several countries and two federal circuits for almost ten years. We set forth only those facts relevant to the disposition of the appeal.

A. The Project and Arbitration Award

In 1994, KBC, a Cayman Islands limited liability company owned by American power companies and other investors, and Pertamina, an oil and gas company owned and controlled by the Republic of Indonesia, entered into a joint venture for a project to explore and develop certain geothermal energy resources in Indonesia (the "Project"). *See District Court Opinion,* 465 F.Supp.2d at 284. The parties agreed to settle any disputes between them by binding arbitration in Geneva, Switzerland, under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"). The parties further agreed that their contractual relationship would be governed by Indonesian law.

By 1998, the Indonesian government had suspended the Project. In 1998, KBC initiated arbitration proceedings in Switzerland in which it contended that the Indonesian government's actions caused it over $600 million in damages and lost profits. During the arbitration, the parties contested the potential yield of the geothermal resources KBC had contracted to develop with Pertamina and the validity of KBC's projections concerning the facilities it could develop to tap those resources. Pertamina contended that the geothermal resource and development estimates put forward by KBC when entering into the Project were "sham[s]," and that KBC had "no *bona fide* intention" to develop the energy-generating facilities proposed in its documents. The Swiss arbitral tribunal rejected Pertamina's allegations "about the genuineness" of

the information provided by KBC in support of its claims, but acknowledged the possibility that KBC's projections may have been "overestimate[s]." On December 18, 2000, the arbitral panel issued a final decision (the "Award") awarding KBC more than $261 million in damages, lost profits, and costs of arbitration, plus 4% interest per annum from January 1, 2001, until the date of full payment. In February 2001, Pertamina filed a petition challenging the Award in the Supreme Court of Switzerland. This challenge was dismissed in April 2001 because Pertamina failed to pay court fees on a timely basis. *District Court Opinion,* 465 F.Supp.2d at 284-85. The dismissal became final in August 2001 when the Supreme Court of Switzerland denied Pertamina's request for reconsideration.

B. Fifth Circuit Litigation

In early 2001, KBC initiated proceedings in the United States District Court for the Southern District of Texas ("Texas District Court") to confirm the Award pursuant to the New York Convention. The Texas District Court entered a judgment in December 2001 confirming the Award in the amount of $261 million plus interest. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 190 F.Supp.2d 936 (S.D.Tex.2001) ("*Texas Confirmation Opinion*").

While the Texas District Court judgment confirming the Award was on appeal to the Fifth Circuit, Pertamina filed an action in a Jakarta, Indonesia, trial court in March 2002 seeking to collaterally attack the Award and enjoin KBC from

enforcing the Award. KBC obtained a temporary restraining order from the Texas District Court prohibiting Pertamina from pursuing injunctive relief against KBC in Indonesia while the Texas District Court considered whether the Indonesian action impinged on its judgment and "upon KBC's legitimate efforts to enforce [KBC's] rights thereunder." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Nebara,* 264 F.Supp.2d 470, 474 (S.D.Tex.2002) ("*Texas Injunction Opinion*"),*rev'd,*335 F.3d 357 (5th Cir.2003) ("*Fifth Circuit Injunction Opinion*"). Despite the Texas District Court's temporary restraining order, Pertamina obtained an injunction from the Indonesian trial court prohibiting KBC from enforcing the Award and imposing on KBC "the obligation to pay enforcement money in the amount of US$500,000.00 for each day this order is contravened, which amount must be paid promptly and fully to ... Pertamina." *Texas Injunction Opinion,* 264 F.Supp.2d at 474 n. 3 (quoting Indonesian injunction). The Indonesian trial court also issued an order annulling the Award. *See Fifth Circuit Injunction Opinion,* 335 F.3d at 363. Following entry of the Indonesian injunction, the Texas District Court issued a preliminary injunction prohibiting Pertamina from enforcing the Indonesian injunction or collecting penalties that might be imposed on KBC under the Indonesian injunction. *See Texas Injunction Opinion,* 264 F.Supp.2d at 483.

While the Indonesian trial court's decision was on appeal to the Indonesian Supreme Court, the Fifth Circuit vacated the preliminary anti-suit injunction issued by the Texas District Court. *See Fifth Circuit*

Injunction Opinion, 335 F.3d at 360. In its decision, the Fifth Circuit determined that, "as the Convention already provides for multiple simultaneous proceedings, it is difficult to envision how court proceedings in Indonesia could amount to an inequitable hardship" sufficient to support an anti-suit injunction against the Indonesian proceedings. *Id.* at 368. The Fifth Circuit concluded that, in any event, as a court of secondary jurisdiction under the New York Convention,[1] charged only with enforcing

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[1] Under the New York Convention, " 'the country in which, or under the [arbitration] law of which, [an] award was made' is said to have *primary* jurisdiction over the arbitration award. All other signatory States are *secondary* jurisdictions, in which parties can only contest whether that State should enforce the arbitral award." *Fifth Circuit Injunction Opinion*, 335 F.3d at 364 (quoting New York Convention art. V(1)(e)). As explained by the Fifth Circuit, the Convention assigns different roles to national courts to carry out the aims of the treaty. Articles IV and V of the Convention specify the procedures for courts of secondary jurisdictions to follow when deciding whether to enforce a foreign arbitral award. Article IV provides that a party can obtain enforcement of its award by furnishing to the putative enforcement court the authenticated award and the original arbitration agreement (or a certified copy of both). Article V, in turn, enumerates specific grounds on which the court *may* refuse enforcement if the party contesting enforcement provides proof sufficient to meet one of the bases for refusal.

In contrast to the limited authority of secondary-jurisdiction courts to review the arbitral award, courts of primary jurisdiction, usually the courts of the country of the arbitral situs, have much broader discretion to set aside an award. By its silence on the matter, the Convention does not restrict the grounds on which primary-jurisdiction courts may annul an award, thereby leaving to a primary jurisdiction's local law the decision whether to set aside an award. Consequently, even though courts of a *primary* jurisdiction may apply their own domestic law when evaluating an attempt to annul or set aside

or refusing to enforce a foreign arbitral award, it is not the district court's burden or ours to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it. *Id.* at 369.

In March 2004, the Indonesian Supreme Court vacated the Indonesian trial court's order annulling the Award and issuing the anti-suit injunction. In the ruling, the Indonesian Supreme Court concluded that only a Swiss court had power to annul the Award. Later that month, the Fifth Circuit affirmed the Texas District Court's confirmation of the Award. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 282 (5th Cir.) ("*Fifth Circuit Confirmation Opinion*"), *cert. denied,* 543 U.S. 917-18, 125 S.Ct. 59, 160 L.Ed.2d 202 (2004).[2] In doing so, the Fifth Circuit concluded (as had the Supreme Court of Indonesia,

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an arbitral award, courts in countries of *secondary* jurisdiction may refuse enforcement only on the limited grounds specified in Article V. *Id.* at 368 (footnotes omitted).

[2] The appeal was not heard until after Judge Griesa had considered and rejected Pertamina's post-judgment motion for relief from judgment pursuant to Fed.R.Civ.P. 60(b)(2) (providing for relief from judgment on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial") and Fed.R.Civ.P. 60(b)(5) (providing for relief from judgment if, *inter alia,* "a prior judgment on which it is based has been reversed or otherwise vacated"). Pertamina argued that newly-discovered evidence that some of KBC's investors had received payments pursuant to a political risk insurance policy supported relief under Rule 60(b)(2), and that the Indonesian trial court's order annulling the award supported relief under Rule 60(b)(5). *See Fifth Circuit Confirmation Opinion,* 364 F.3d at 286.

unbeknownst to the Fifth Circuit) that, because only a Swiss court could annul the award under the New York Convention, the Indonesian annulment order did not require vacating the judgment confirming the Award in the United States. *See Id.* at 308-10.

C. Other Confirmation and Enforcement Proceedings

Pursuant to the New York Convention, KBC also sought to confirm and enforce the Award against Pertamina in Hong Kong, Singapore, and Canada. Those efforts yielded approximately $900,000 to be applied to the amount owed by Pertamina under the Award. *See District Court Opinion,* 465 F.Supp.2d at 286.[3]

D. Second Circuit Litigation

1. Enforcement Proceedings

When Pertamina appealed the Texas District Court's judgment to the Fifth Circuit, it declined to post a supersedeas bond in order to obtain a stay of judgment pending appeal. *See* Fed.R.Civ.P. 62(d) ("When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay...."). This permitted KBC to seek registration and enforcement of the Texas District Court's judgment in the Southern District of New York, where Pertamina

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[3] KBC confirmed its award in Hong Kong and Canada but obtained funds from Pertamina only in Hong Kong. *Id.* KBC voluntarily dismissed its action in Singapore. *Id.*

maintained several bank accounts in its name that held hundreds of millions of dollars in assets. *See* 28 U.S.C. § 1963 (providing for registration of federal judgments in other districts);[4] *District Court Opinion*, 465 F.Supp.2d at 286, 291. KBC registered the Texas judgment confirming the Award with the District Court on February 22, 2002, and immediately commenced execution proceedings against Pertamina. *See Id.* at 286.

The parties then engaged in heated litigation concerning ownership of the assets in the New York bank accounts held in Pertamina's name. Pertamina contended that the Indonesian government was the actual owner of the funds in the New York bank accounts. On an interlocutory appeal certified pursuant to 28 U.S.C. § 1292(b), we determined that

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[4] 28 U.S.C. § 1963 states, in relevant part:

> A judgment in an action for the recovery of money or property entered in any court of appeals, district court, bankruptcy court, or in the Court of International Trade may be registered by filing a certified copy of the judgment in any other district ... when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown.... A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

The procedure prescribed under this section is in addition to other procedures provided by law for the enforcement of judgments.

both Pertamina and the Indonesian government owned some part of the funds in the accounts; and that KBC was entitled to satisfy its judgment against Pertamina out of the portion of the funds owned by Pertamina. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 313 F.3d 70, 75, 92-93 (2d Cir.2002), *cert. denied,*539 U.S. 904, 123 S.Ct. 2256, 156 L.Ed.2d 113 (2003). The District Court ultimately ordered Pertamina to turn over to KBC the entire amount of the Award (by this time valued at roughly $319 million, including interest on the award)-less the $900,000 already recovered by KBC in Hong Kong-out of the Pertamina-owned funds in the New York bank accounts. *See District Court Decision,* 465 F.Supp.2d at 291. We affirmed this order in March 2006. *See Karaha Bodas Co. v. Ministry of Finance of the Republic of Indonesia,* Nos. 04-6551-cv, 04-6672-cv, 2006 WL 565694, at *2 (2d Cir. Mar.9, 2006). Pertamina, seeking review of our decision, petitioned the United States Supreme Court for a writ of certiorari.

2. The Anti-Suit Injunction

While Pertamina's petition for a writ of certiorari was pending before the Supreme Court, the District Court asked Pertamina whether, if the Supreme Court denied certiorari, Pertamina would finally consent to pay the remainder of the judgment against it, thus ending the litigation between the parties. *See District Court Opinion,* 465 F.Supp.2d at 288. In a letter to the District Court dated August 28, 2006, Pertamina stated that if certiorari were denied, it would "not object before this Court to the payment

of the judgment." *Id.* This statement was technically accurate. The Supreme Court denied certiorari on October 2, 2006, see --- U.S. ----, 127 S.Ct. 129, 166 L.Ed.2d 35 (2006), and on October 10, 2006, almost all of the remainder of the $319 million payment was turned over to KBC.[5] In the meanwhile, however, Pertamina filed a new action in the Cayman Islands (the "Cayman Islands action").

The Cayman Islands action, filed on September 15, 2006, was based on the theory that the Award was procured by fraud. Pertamina sought damages in the amount of the Award against KBC along with a variety of ancillary remedies. *See District Court Opinion,* 465 F.Supp.2d at 288-89. Specifically, Pertamina alleged in a supporting affidavit that, in August 2005, Pertamina's "advisors" discovered documents that "KBC had left behind when it ceased its operations and left Indonesia some time around 2002," which "revealed that KBC had committed a fraud on Pertamina" by creating fraudulent resource and development estimates for the Project. Pertamina further alleged that the fraud associated with these estimates was "such as to vitiate the Arbitral Award." *District Court Opinion,* 465 F.Supp.2d at 289 (internal quotation marks omitted). Accordingly, Pertamina sought damages, an accounting, and restitution from KBC for the alleged fraud, including "[r]estitution and/or equitable compensation and/or repayment of ... all sums

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[5] "A small portion of the funds were not turned over until November 29, 2006, when the final turnover calculation was made." Appellee's Br. 13 n. 7.

received by [KBC] pursuant to the Arbitral Award (and its enforcement)." *See id*[6]. Pertamina also sought a "*Mareva* injunction"[7] prohibiting KBC from disposing of any funds obtained pursuant to the Award, including "any sums received or to be received by [KBC] pursuant to any order of the United States District Court for the Southern District of New York ... pursuant to proceedings ... directed to enforcing the [Award] in favour of [KBC]." *See District Court Opinion,* 465 F.Supp.2d at 289-90.

In response to the Cayman Islands action, KBC moved in the Southern District of New York for an injunction prohibiting Pertamina from (1) maintaining the Cayman Islands action, or any similar action anywhere, and (2) restraining KBC from disposing of funds obtained from Pertamina. The District Court granted KBC's application for an anti-suit injunction. It found that the Cayman

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[6] These allegations and claims were renewed in an Amended Writ of Summons filed on October 6, 2006, after the United States Supreme Court had denied Pertamina's petition for a writ of certiorari.

[7] Injunctions that prohibit a party from transferring assets pending resolution of an action in order to "ensure the effectiveness of an ultimate remedy ... [are] known as '*Mareva* injunctions' for the second English case to issue one, *see Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A.*, (1975) 2 Lloyd's Rep. 509." *SEC v. Cavanagh,* 445 F.3d 105, 117 & n. 27 (2d Cir.2006). Though these injunctions are "available in equity in England and Canada, among other places," *Id.* at n. 27, federal courts lack power to issue them. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 328-29, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999); *Cavanagh*, 445 F.3d at 117-18.

Islands action was intended to undo the Award and, furthermore, "ha[d] the obvious purpose of nullifying the judgment[s] of the federal court in Texas ... [and] the Southern District of New York." *District Court Opinion,* 465 F.Supp.2d at 292-93. After noting that it "ha[d] the power, and indeed the duty, to deal with abusive litigation tactics used by a party before it," the District Court concluded that Pertamina had engaged in abusive litigation tactics by deciding to file suit in the Cayman Islands rather than seek relief using means available to it under federal law.[8] *See Id.* at 300. Accordingly, the District Court (1) made the injunction permanent and (2) issued a declaratory judgment "declaring that the funds recovered by KBC pursuant to the judgments in this matter are the property of KBC, that KBC has full right to dispose of such funds as KBC sees fit, and that, in the event that Pertamina should for some reason obtain an order of the Cayman Islands court or any other court, based upon matters relating to the Arbitral Award, purporting to interfere with KBC's rights to dispose of the funds, KBC has no obligation to comply with such order." *Id.* at 301.

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[8] The District Court noted that Pertamina could have sought relief from the federal judgments confirming and enforcing the award in federal court through Fed.R.Civ.P. 60(b)(3), which permits a motion seeking relief from judgment to be brought (1) on the basis of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party," or (2) through "an independent action" alleging fraud. *See* 465 F.Supp.2d at 293-94; *see also* Fed.R.Civ.P. 60(b) (noting that courts may "entertain an independent action to relieve a party from a judgment, order, or proceeding, ... or to set aside a judgment for fraud upon the court").

Finally, pending appeal, it stayed its decision authorizing KBC to dispose of funds obtained pursuant to its earlier judgments.

3. Subsequent Developments

While Pertamina's appeal from the District Court's anti-suit injunction was being briefed, KBC moved us to lift the stay entered by the District Court, thereby authorizing it to distribute to its shareholders the $263 million it had obtained from Pertamina. We granted KBC's motion on February 13, 2007. On February 15, 2007, Pertamina's motion for an emergency stay before the United States Supreme Court was denied. At oral argument for the instant appeal, we were informed by KBC that, following the lifting of the stay, KBC distributed substantially all of the remaining Pertamina funds to its shareholders and was thus no longer in possession of any of the assets that would be the subject of the *Mareva* injunction sought by Pertamina in the Cayman Islands.[9] Following oral argument, we ordered the parties to submit supplemental letter briefs addressing whether the satisfaction of the money judgment against Pertamina affected the District Court's jurisdiction to maintain the

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[9] On April 30, 2007, KBC obtained an order sanctioning Pertamina for bad-faith litigation conduct. The District Court found that a Pertamina witness had lied in a deposition in an effort to frustrate the District Court from accurately ruling on the ownership of funds in New York bank accounts. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, No. 21-98, 2007 WL 1284903 at *6 (S.D.N.Y. Apr. 30, 2007).

injunction.

A. Standard of Review

The standard of review for the grant of a permanent injunction, including an anti-suit injunction, is abuse of discretion. *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Tech., Inc.*, 369 F.3d 645, 651 (2d Cir.2004); *China Trade*, 837 F.2d at 37. We will find such an abuse of discretion if the district court "applies legal standards incorrectly or relies upon clearly erroneous findings of fact, or proceed[s] on the basis of an erroneous view of the applicable law." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 398 (2d Cir.2004) (citation omitted); *see also Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir.2001) ("error of law" constitutes "abuse of discretion").

B. The *China Trade* Test Applies to, and Supports Entry of, the Anti-Suit Injunction

1. The *China Trade* Test

In *China Trade*, we adopted a test governing the circumstances under which a federal district court could issue an anti-foreign-suit injunction. Under the *China Trade* test, an anti-suit injunction against foreign litigation may be imposed only if two threshold requirements are met: "(A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined." *Paramedics*, 369 F.3d at 652 (citing *China Trade*, 837 F.2d at 35). If these two threshold requirements are satisfied, "courts are

directed to consider a number of additional factors," *Id.*, including whether the parallel litigation would:

> (1) frustrat[e] ... a policy in the enjoining forum; (2) ... be vexatious; (3) ... threat[en] ... the issuing court's in rem or quasi in rem jurisdiction; (4) ... prejudice other equitable considerations; or (5) ... result in delay, inconvenience, expense, inconsistency, or a race to judgment.

Ibeto Petrochemical Industries Ltd. v. M/T Beffen, 475 F.3d 56, 64 (2d Cir.2007) (quoting *China Trade*, 837 F.2d at 35). *China Trade* instructed that two of these factors should be accorded "greater significance": whether the foreign action threatens the enjoining forum's jurisdiction or its "strong public policies." 837 F.2d at 36. However, we have reiterated that *all* of the additional factors should be considered when determining whether an anti-suit injunction is warranted. *See Ibeto Petrochemical*, 475 F.3d at 64 (disagreeing with courts and commentators that "have erroneously interpreted *China Trade* to say that we consider *only* these two [more significant] factors"). *China Trade* also states that "principles of comity counsel that injunctions restraining foreign litigation be 'used sparingly' and 'granted only with care and great restraint.' "*Paramedics*, 369 F.3d at 652 (quoting *China Trade*, 837 F.2d at 36).

2. The *China Trade* Test Applies to the Anti-Suit Injunction

China Trade involved an anti-suit injunction prohibiting a foreign defendant from pursuing a parallel proceeding in a foreign forum *while a proceeding was pending* in the Southern District of New York. The District Court, noting that judgment had already been entered in American courts, did not apply the *China Trade* test. Relying on *dicta* in a district court decision that had been affirmed by our Court in a brief published *per curiam* opinion, the District Court concluded that a "more lenient standard" applied to injunctions intended to prevent an abusive effort to evade a domestic judgment. *See District Court Opinion,* 465 F.Supp.2d at 294-95 (quoting *Farrell Lines Inc. v. Columbus Cello-Poly Corp.,* 32 F.Supp.2d 118, 131 (S.D.N.Y.1997), *aff'd sub nom, Farrell Lines Inc. v. Ceres Terminals Inc.,* 161 F.3d 115 (2d Cir.1998)).[10]

In the instant case, Pertamina argues that the District Court committed legal error in concluding that KBC did not have to satisfy the *China Trade*

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[10] In *Farrell Lines,* the district court held that the plaintiff *had* satisfied the "strict" *China Trade* standard before proceeding to note that a "more lenient" standard *should* apply where the domestic forum had already decided the merits of the claim being relitigated in a foreign forum. *See Farrell Lines,* 32 F.Supp.2d at 130-31. *Farrell Lines* derived the "more lenient standard" from the District of Columbia Circuit's decision in *Laker Airways Ltd. v. Sabena, Belgian World Airlines,* 731 F.2d 909 (D.C.Cir.1984), which stated that when "the [anti-foreign-suit] injunction is requested after a previous judgment on the merits, ... a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive relitigation." *Id.* at 928; *see Farrell Lines,* 32 F.Supp.2d at 131.

test in order to obtain an anti-suit injunction against it. It notes that the *China Trade* test has been applied by our Court for twenty years, and that we applied the *China Trade* test to an anti-foreign-suit injunction in *Paramedics* even though a "judgment ha[d] been rendered" in that case. 369 F.3d at 651, 653-54.

We agree with Pertamina that, pursuant to our decision in *Paramedics,* the *China Trade* test applies to anti-foreign-suit injunctions intended to protect federal judgments. We note, however, that as discussed in *Paramedics,* the discretionary *China Trade* factors will tend to weigh in favor of an anti-foreign-suit injunction that is sought to protect a federal judgment. In *Paramedics,* we applied the *China Trade* test to an anti-foreign-suit injunction that was entered to protect a federal judgment compelling arbitration. *See* 369 F.3d at 653-54. In doing so, we explained that " '[t]here is less justification for permitting a second action,' as here, 'after a prior court has reached a judgment on the same issues,' " *Id.* at 654 (quoting *Laker Airways,* 731 F.2d at 928 n. 53), and that "[a]n anti-suit injunction may be needed to protect the court's jurisdiction once a judgment has been rendered," *Id.* We also concluded that while "[p]rinciples of comity weigh heavily in the decision to impose a foreign anti-suit injunction .... where one court has already reached a judgment-on the same issues, involving the same parties-considerations of comity have diminished force." *Id.* at 654-55.

3. The *China Trade* Test Is Satisfied

Despite the District Court's legal error in not applying the *China Trade* test, we do not think it necessary to vacate the injunction and remand for further proceedings given the particular circumstances of the instant case. The principal difference between the "more lenient" test applied by the District Court and the *China Trade* test lies in the threshold requirements that a party must surmount to obtain an injunction under the latter. Based on the extensive record developed in the District Court and in other United States and foreign courts, we conclude as a matter of law that those threshold requirements are met. Turning to the discretionary factors under *China Trade,* we find that the District Court properly considered these factors, albeit under a different rubric, and found them supportive of injunctive relief.[11]

a. The Threshold Requirements Are Met

It is undisputed that the first threshold requirement of *China Trade* is satisfied; the parties are the same in both the proceedings before the District Court and in the Cayman Islands action. Application of the second threshold requirement of *China Trade*-that resolution of the case before the enjoining court is dispositive of the action to be enjoined, *see* 837 F.2d at 35-requires further analysis. First, we must determine the substance of the "case before the enjoining court." KBC obtained

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[11] We further note that the scope and duration of this litigation militate heavily in favor of a swift and definitive resolution of the dispute over the injunction.

(1) a judgment from the Texas District Court confirming the Award and (2) judgments from the Southern District of New York enforcing the Texas District Court's judgment (collectively, the "federal judgments"). Pertamina asserts that the only "case before the enjoining court"-that is, the Southern District of New York-was the determination of whether certain funds located in New York could be used to satisfy a judgment against it. According to Pertamina, the proceedings before the Southern District of New York thus could not have been dispositive of the Cayman Islands action because the enforcement proceeding that took place there "in no way implicated-let alone was dispositive of-Pertamina's lawsuit for fraud in the Cayman Islands." Pertamina argues further that the Southern District of New York inappropriately "arrogated to itself the role of defending the judgment of the Southern District of Texas confirming the arbitration award."

This argument is without merit. When KBC registered the Texas District Court's judgment confirming the arbitration award in the Southern District of New York, that judgment had the same effect, and was entitled to the same protection, as if it had been entered in the Southern District of New York in the first instance. *See* 28 U.S.C. § 1963 (stating that a registered judgment "shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner"). The Southern District of New York was therefore empowered to take any action to protect the judgment confirming the Award that the Texas District Court could have taken. KBC did not need to

return to Texas in order to protect and enforce the judgment. *See Smith v. Woosley*, 399 F.3d 428, 431-36 (2d Cir.2005) (affirming anti-suit injunction issued by Connecticut federal court to protect judgment rendered by Pennsylvania federal court); *Covington Indus., Inc. v. Resintex A. G.*, 629 F.2d 730, 732 n. 2 (2d Cir.1980) (discussing power of court of registration to determine validity of judgment rendered in another federal district). Thus, we conclude that the "case before the enjoining court" includes all of the federal judgments related to the case, including (1) the Texas District Court judgment confirming the Award and (2) the judgments entered by the Southern District of New York enforcing the Texas District Court's judgment.

We also must examine whether the federal judgments that the Southern District of New York sought to protect were "dispositive" of the Cayman Islands action. We agree with KBC that the federal judgments satisfy the *China Trade* requirement because the Award, and the federal judgments confirming and enforcing it, actually decided the claims raised in the Cayman Islands action. We also conclude that the New York Convention permits the federal judgments to be treated as "dispositive" of the Cayman Islands action.

As discussed above, the Texas District Court confirmed, and the District Court enforced, an Award that was entered in a Swiss arbitration proceeding. These courts confirmed and enforced the Award against Pertamina even though, as discussed above, Pertamina had argued in the Swiss arbitration that the resource and development estimates prepared by

KBC were fraudulent-the same allegation, though assertedly with new factual support, that Pertamina makes in the Cayman Islands action. Moreover, the Fifth Circuit, in affirming the Texas District Court's confirmation of the arbitration award, rejected Pertamina's argument that enforcement of the Award should be refused because it was procured by fraud. *See Fifth Circuit Confirmation Opinion,* 364 F.3d at 306-07 (noting that "[e]nforcement of an arbitration award may be refused ... if the award was procured by fraud" and rejecting arguments that enforcement of the award against Pertamina should be refused on this basis).

Pertamina argues that the Cayman Islands action is a proceeding "separate and independent of the arbitration proceedings and award." We, however, conclude that this characterization is inconsistent with the nature of the Cayman Islands action. Beyond seeking to vitiate the Award, the Cayman Islands action seeks a(1) determination that the District Court wrongfully ordered almost $319 million to be paid to KBC pursuant to the federal judgments confirming and enforcing the Award, and (2) return of all funds obtained by KBC "pursuant to the Arbitral Award (and its enforcement)."[12]

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[12] We also note that, were the action brought in federal court, it would not have been characterized as an "independent" action. Because the action, if successful, would have the effect of vitiating the federal judgments, the action would have been treated as "ancillary" to the earlier federal proceedings-in essence, as "a continuation of the former suit" in federal court-even if it was formally denominated as an "independent action" for fraud. *United States v. Beggerly,* 524 U.S. 38, 45-46, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998) (quoting *Pacific R.R. of Mo. v. Missouri Pacific Ry. Co.,* 111 U.S. 505, 522, 4 S.Ct. 583, 28

Although Pertamina makes new factual allegations in support of its claim that the Award should not have been enforced against it, these new factual allegations are not sufficient to undermine the preclusive effect of several earlier federal court decisions that (1) the Award should be enforced and (2) KBC is entitled to Pertamina's New York funds in an amount sufficient to satisfy the Award. *See Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 661-63 (2d Cir.1997) (holding that a district court properly dismissed, as barred by *res judicata*, an "independent action" for rescission of a prior judgment on the basis of fraud, where the plaintiff failed to mount "a viable direct attack" on the earlier judgment);[13] Restatement (Second) of Judgments § 27 (1982) ("When an issue *of fact or law* is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties ...." (emphasis

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L.Ed. 498 (1884)).

[13] *Campaniello Imports* explained that claimants seeking to vitiate an earlier judgment through an independent action "must (1) show that they have no other available or adequate remedy; (2) demonstrate that movants' own fault, neglect, or carelessness did not create the situation for which they seek equitable relief; and (3) establish a recognized ground-such as fraud, accident, or mistake-for the equitable relief." 117 F.3d at 662. Pertamina does not even attempt to satisfy the first requirement; it does not seriously dispute the District Court's conclusion that there were remedies for the alleged fraud available to it under federal law in 2002, when it obtained the documents that serve as the basis for its allegedly "new" fraud claim, or in 2005, when it finally reviewed the documents and allegedly discovered the fraud.

added)); *Id.* cmt. c ("[I]f the party against whom preclusion is sought did in fact litigate an issue of ultimate fact [*i.e.*, an issue requiring application of law to fact] and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact ...."); cf. *Paramedics*, 369 F.3d at 653 (concluding, without considering the factual basis for foreign litigation, that a federal judgment compelling arbitration was dispositive of foreign litigation because the foreign litigation "concern [ed] issues that, by virtue of the district court's judgment, are reserved to arbitration").[14]

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[14] Pertamina argues that the threshold requirements of the *China Trade* test should be read as coextensive with the test applicable to federal anti-suit injunctions precluding actions in state court. A federal court has power under the Anti-Injunction Act, 28 U.S.C. § 2283, to issue an injunction "to protect ... its judgments" from further litigation in state courts under the "relitigation exception" to the broad prohibition of the Anti-Injunction Act. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988); *see also Smith*, 399 F.3d at 431. *Choo* held that the "relitigation exception" only permits a federal court "to protect against relitigation of 'claims or issues' that 'actually have been decided by the federal court.' "*Smith*, 399 F.3d at 434 (quoting *Choo*, 486 U.S. at 148, 108 S.Ct. 1684). We noted in *Smith* that *Choo*, [b]y referring to both "claims" and "issues," ... permitted the relitigation exception to be applied to protect a federal court[ ] judgment that would be entitled to more than the issue-preclusion effect of collateral estoppel. A judgment adjudicating a claim could also be protected. But by insisting that the "claims or issues ... actually have been decided," *Choo*, 486 U.S. at 148 [108 S.Ct. 1684], the Court was not permitting protection of the full *res judicata* effect of a judgment, *i.e.*, preclusion of claims that, while not litigated, arose from the same common nucleus of operative facts as the litigated claim. *Smith*, 399 F.3d at 434 n. 8. We need not reach the question of whether the *China Trade* test

We also conclude that, under the New York Convention, the federal judgments to be protected are "dispositive" of the Cayman Islands action. Pertamina essentially argues that the federal judgments could not be dispositive because (1) the federal courts involved in confirming and enforcing the Award within the United States were only acting as "secondary-jurisdiction court[s] under the Convention," Appellant's Br. 41 (quoting *Fifth Circuit Injunction Opinion*, 335 F.3d at 372 n. 59), and (2) secondary jurisdictions, under the New York Convention, are not entitled to protect judgments related to a foreign arbitral award from foreign interference In doing so, it relies on the Fifth Circuit's earlier opinion vacating the Texas District Court's anti-suit injunction. In that decision, the Fifth Circuit noted that, because the New York Convention contemplates multiple proceedings in several nations to procure and enforce a foreign arbitral award, it was not appropriate for a secondary-jurisdiction court "to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it."

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would permit a federal court to protect the "full *res judicata* effect" of a federal judgment by enjoining claims that "while not litigated, arose from the same common nucleus of operative facts as the litigated claim," *Id.*, because the claims raised in the Cayman Islands action concerning the validity of the Award and KBC's entitlement to Pertamina's funds have *actually been* litigated in the Southern District of Texas and the Southern District of New York, even if Pertamina seeks to offer new facts in the Cayman Islands action in support of its position.

Fifth Circuit Injunction Opinion, 335 F.3d at 369.

We agree with the Fifth Circuit that federal courts should not attempt to protect a party seeking enforcement of an award under the New York Convention "from *all* the legal hardships" associated with foreign litigation over the award. But it does not follow, as Pertamina would have us hold, that a federal court cannot protect a party who is the beneficiary of a federal judgment enforcing a foreign arbitral award from *any* of the legal hardships that a party seeking to evade enforcement of that judgment might seek to impose. Federal courts in which enforcement of a foreign arbitral award is sought cannot dictate to other "secondary" jurisdictions under the New York Convention whether the award should be confirmed or enforced in those jurisdictions. *See Id.* at 372 n. 59 (noting that a federal judgment enforcing a foreign arbitral award under the New York Convention does "not automatically receive *res judicata* effect" in other jurisdictions in which enforcement is sought). But federal courts *do* have inherent power to protect *their own* judgments from being undermined or vitiated by vexatious litigation in other jurisdictions. *See Ibeto Petrochemical,* 475 F.3d at 64 (discussing whether "the foreign action would be vexatious" in affirming an antiforeign-suit injunction); *Covanta Onondaga Ltd. v. Onondaga County Res. Recovery Agency,* 318 F.3d 392, 398 (2d Cir.2003) (noting "a court's unquestioned authority to terminate and prevent the renewal of a protracted series of vexatious lawsuits filed by a litigant"). Moreover, "[e]ven in the absence of a pattern of vexatious litigation ... a district court that has adjudicated the merits of a case may have

authority to prevent relitigation." *Covanta Onondaga,* 318 F.3d at 398. As the Fifth Circuit recognized, the New York Convention does not divest federal courts of this inherent power. *See Fifth Circuit Injunction Opinion,* 335 F.3d at 365 ("Given the absence of an express provision [in the New York Convention], we discern no authority for holding that the New York Convention divests the district court of its inherent authority to issue an antisuit injunction.").

In this case, the federal judgments reached a dispositive determination that KBC should be paid $319 million of Pertamina's funds, held in New York bank accounts, pursuant to the Award. This determination is entitled to protection from Pertamina's attempts to vitiate it through the Cayman Islands action. The existence of the federal judgments ordering Pertamina to turn over $319 million is one of the factors distinguishing the injunction issued by the District Court from the injunction against the Indonesian action, which was vacated by the Fifth Circuit in 2003. In 2003, the Texas District Court had only confirmed the Award, and there had been no definitive determination that KBC was entitled to the funds that Pertamina held in the New York bank accounts. By the time that the District Court entered the anti-suit injunction at issue in this appeal, however, additional federal judgments enforcing KBC's Award had been entered. As the District Court noted, those judgments "are not conditional, or qualified, or limited in any way as to KBC's rights with respect to the monies awarded" pursuant to the Award and the federal judgment confirming it. *District Court Opinion,* 465 F.Supp.2d

at 300.

The nature of the Cayman Islands action that the District Court sought to enjoin also distinguishes the injunction at issue here from the injunction that was vacated by the Fifth Circuit. When the Fifth Circuit vacated the anti-suit injunction prohibiting litigation in Indonesia, Pertamina had an arguable-though ultimately meritless-basis for claiming that the Indonesian proceedings were permissible under the New York Convention. Under the Convention, a jurisdiction may decline to enforce a foreign arbitral award if it has "been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention art. V(1)(e). Pertamina argued that, because Indonesian substantive law applied to the dispute between the parties, an Indonesian court had the power to set aside or suspend the Award. *See Fifth Circuit Confirmation Opinion*, 364 F.3d at 308 (noting that "Pertamina suggests that both Switzerland (the host country) and Indonesia (the country of governing law) have primary jurisdiction over the arbitration in this case" under Article V(1)(e) of the Convention); *see also* Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1069 (1961) (asserting that Article V(1)(e) "provides that when an award is rendered in one state under the law of a second state, the courts of that second state may set aside or suspend the award").[15] In 2004, after the Texas District Court's

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[15] We disagreed with this proposition in *Yusuf Ahmed*

anti-suit injunction had been vacated, the Fifth Circuit concluded that only Switzerland had authority to set aside the Award in this case. *See Fifth Circuit Confirmation Opinion,* 364 F.3d at 308-10. But when it initiated proceedings in Indonesia in 2002, Pertamina at least had a colorable argument that Indonesian courts had a role to play in determining whether the Award should be enforced.

Here, by contrast, the Cayman Islands has no arguable basis for jurisdiction to adjudicate rights and obligations of the parties with respect to the Award. Cayman Islands courts have no power to modify or annul the Award under the Convention; and Pertamina does not even attempt to argue that the Cayman Islands action is one that would be contemplated by the Convention. We conclude that in these circumstances the District Court had power to prevent Pertamina from engaging in litigation that would tend to undermine the regime established by the Convention for recognition and enforcement of arbitral awards. "[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce ... agreement[s]" to submit disputes to binding international arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 629, 105

Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 21 (2d Cir.1997) (expressing approval for the proposition that "only the state under whose procedural law the arbitration was conducted has jurisdiction under Art. V(1)(e) to vacate the award").

S.Ct. 3346, 87 L.Ed.2d 444 (1985). These considerations also require us to protect the regime established by the Convention for enforcement of international arbitral awards, if necessary by enjoining parties from engaging in foreign litigation that would undermine it.[16]

b. The Additional *China Trade* Factors Support Issuance of an Injunction

As discussed above, where an anti-foreign-suit injunction is sought to protect a federal judgment, the additional *China Trade* factors will often favor issuance of an anti-suit injunction when the threshold *China Trade* requirements are met. Despite adopting a "more lenient" test, the District Court considered the discretionary factors set forth in *China Trade* and determined they warranted an injunction. *See District Court Opinion,* 465 F.Supp. at 295-301. We agree.

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[16] The Fifth Circuit expressed concern that permitting the Texas District Court's earlier injunction against Pertamina's Indonesian action to stand "could set an undesirable precedent under the Convention, permitting a secondary jurisdiction to impose penalties on a party when it disagrees with that party's attempt to challenge an award in another country." *Fifth Circuit Injunction Opinion,* 335 F.3d at 373. We agree with the Fifth Circuit that no mere disagreement with a party's approach to enforcing or attacking a foreign arbitral award under the Convention should suffice to support an anti-foreign-suit injunction. But federal courts are not obligated to sit by idly when a party engages in proceedings that undermine the regime governing enforcement of foreign arbitral awards established by the Convention.

We turn first to the two additional factors that have been described as having "greater significance," *China Trade,* 837 F.2d at 36-namely, whether the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum. As in *Paramedics,* "[b]oth considerations are salient in this case." 369 F.3d at 654. *China Trade* held that "an injunction may ... be necessary to protect the enjoining court's jurisdiction." 837 F.2d at 36; *see also Paramedics,* 369 F.3d at 654 ("An anti-suit injunction may be needed to protect the court's jurisdiction once a judgment has been rendered."). Here, an injunction is necessary because the Cayman Islands action threatens to undermine the federal judgments confirming and enforcing the Award against Pertamina, and may also undermine federal jurisdiction to determine whether prior federal judgments should be invalidated on the basis of the fraud alleged by Pertamina. *Cf. Campaniello Imports,* 117 F.3d at 661 ("Res judicata 'does not preclude a litigant from making a direct attack ... upon the judgment *before the court which rendered it.*' " (emphasis added) (quoting *Weldon v. United States,* 70 F.3d 1, 5 (2d Cir.1995))). The injunction is also supported by strong public policy considerations. We have noted "the strong public policy in favor of international arbitration," and the need for proceedings under the New York Convention "to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.,* 403 F.3d 85, 90 (2d Cir.2005) (internal quotation marks omitted). These important objectives would be undermined were we to permit Pertamina to proceed

with protracted and expensive litigation that is intended to vitiate an international arbitral award that federal courts have confirmed and enforced.

We also conclude that one of the three remaining additional *China Trade* factors-whether the foreign action would be vexatious-counsels strongly in favor of the injunction. *China Trade* noted that vexatiousness is "likely to be present whenever parallel actions are proceeding concurrently," 837 F.2d at 36. Proceedings are apt to be especially vexatious, however, where a foreign proceeding threatens to undermine a federal judgment. Here, the District Court expressly (and properly) found that "the entire point of the fraud allegations [of the Cayman Islands action] is to show that the Arbitral Award must be deemed to be vitiated- *i.e.*, to be a nullity." *District Court Opinion,* 465 F.3d at 291. In other words, the District Court concluded that the subsequent litigation in this case, being aimed at the recovery by KBC in the federal courts, was entirely vexatious. As the District Court noted:

> [A]fter almost six years of litigation in district and appellate courts based on the Arbitral Award, the American courts had finally resolved all the issues presented to them about whether the Arbitral Award should be confirmed and about the method by which KBC should recover the large amount due. Although procedures were available under federal law for Pertamina to make its claim of fraud and to seek to prevent KBC from recovering the $319 million, there was no attempt whatever by Pertamina to make use

> of such procedures.... Instead, Pertamina engaged in the six years of litigation in the United States without any mention of its claim of fraud. Finally, at the very moment when the litigation was to be legitimately ended, Pertamina brought the action in the Cayman Islands after engaging in literal subterfuge in dealing with the Court in New York. The purpose of this lawsuit is to effectively wipe out the effect of the United States judgments and to do this with as great an amount of delay as possible.

Id. at 300.[17] As indicated above, federal courts have the authority to restrain a party before it from engaging in vexatious litigation. *See, e.g., Covanta Onondaga,* 318 F.3d at 398. *China Trade* indicates that this authority should be exercised where, as here, other factors also counsel in favor of issuance of an injunction.

Finally, we note that comity considerations, though important, have "diminished force" when a court has already reached a judgment involving the same issues and parties. *Paramedics,* 369 F.3d at

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[17] We note further that the Cayman Islands action follows what, by any account, is an extraordinarily complex and protracted series of proceedings. At oral argument, KBC informed the Court (and Pertamina did not dispute) that Pertamina's resistance to confirmation and enforcement of the Award has required KBC to appear in more than fifteen courts in seven nations over the past nine years, including five appearances in our Court alone, in support of its enforcement efforts.

655. Comity concerns have particular importance under the Convention; a federal court should be wary of entering injunctions that may prevent parties from engaging in post-award enforcement or annulment proceedings that are contemplated by the Convention. But comity concerns under the Convention have no bearing on our consideration of the Cayman Islands action, which is not a proceeding contemplated by the Convention and is, moreover, intended to undermine federal judgments. As we have stated, "orders of foreign courts are not entitled to comity if the litigants who procure them have 'deliberately courted legal impediments' to the enforcement of a federal court's orders." *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 60 (2d Cir.2004) (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 208-09, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958)); *see also Id.* (noting that the District of Columbia Circuit, in *Laker Airways*, 731 F.2d at 939-40, refused to respect an English court's order where the "defendants involved in the American suit had ... gone into the English courts to generate interference with the American courts"). Accordingly, comity concerns do not weigh against entry of an anti-suit injunction in this case.

C. The District Court Maintains Jurisdiction to Enforce the Injunction

In a supplemental letter brief requested by the Court, Pertamina asserts that, regardless of whether the District Court had the authority to issue an anti-suit injunction in the first instance, it now lacks jurisdiction to maintain the injunction because Pertamina has paid the judgment against it.

Pertamina relies primarily on two Supreme Court opinions describing the boundaries of "ancillary jurisdiction," *Kokkonen v. Guardian Life Insurance Company of America,* 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), and *Peacock v. Thomas,* 516 U.S. 349, 116 S.Ct. 862, 133 L.Ed.2d 817 (1996), as well as the Eighth Circuit's recent decision in *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft,* 491 F.3d 355 (8th Cir.2007), which vacated an anti-foreign-suit injunction imposed to protect a federal money judgment once the judgment was satisfied, *see Id.* at 369.

"[T]he doctrine of ancillary jurisdiction ... recognizes federal courts' jurisdiction over some matters (*otherwise beyond their competence*) that are incidental to other matters properly before them." *Kokkonen,* 511 U.S. at 378, 114 S.Ct. 1673 (emphasis added). The Court, in *Kokkonen,* found that jurisdiction to maintain ancillary proceedings may be exercised for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent ... and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees, *see, e.g., Chambers v. NASCO, Inc.,* 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (power to compel payment of opposing party's attorney's fees as sanction for misconduct); *United States v. Hudson,* 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812) (contempt power to maintain order during proceedings). 511 U.S. at 379-80, 114 S.Ct. 1673. It also held that a federal court did not maintain ancillary jurisdiction to hear disputes over a

settlement agreement that was not entered as an order of the court. *See Id.* at 381-82, 114 S.Ct. 1673. In *Peacock,* the Court observed that it had "approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments-including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances," *Id.* at 356, 116 S.Ct. 862, but noted that "recognition of these supplementary proceedings has not ... extended beyond attempts to execute, or to guarantee eventual executability of, a federal judgment," *Id.* at 357, 116 S.Ct. 862.

Goss involved an anti-suit injunction that was entered to ensure satisfaction of an antidumping judgment against a Japanese company. 491 F.3d at 358-59. New federal legislation repealed the antidumping statute under which the plaintiff in *Goss* had recovered, but did so only prospectively; in response, Japan enacted a law, the "Special Measures Law," that was intended to permit the defendant in *Goss* to seek return of the award in Japanese courts. *See Id.* The district court entered an anti-suit injunction prohibiting an action from being filed under the Special Measures Law; after the injunction was issued, the defendant paid the federal judgment in full. *See Id.*

Noting that "there [wa]s no longer an outstanding judgment to protect," the Eighth Circuit concluded the relevant "jurisdictional circumstances and comity concerns" now weighed in favor of ending the injunction. *Id.* at 368. With respect to comity, the Eighth Circuit concluded that (1) federal courts no

longer had any direct interest in the matter and (2) because the Japanese government had passed the Special Measures Law, Japanese courts should have an initial opportunity to determine the enforceability of the Special Measures Law. *See Id.* at 366-68. With respect to jurisdiction, the Eighth Circuit reasoned that, under *Peacock,* the district court retained ancillary enforcement jurisdiction only "*until* satisfaction of the judgment." *Id.* at 365 (citing *Peacock,* 516 U.S. at 356-57, 116 S.Ct. 862). It also noted that the All Writs Act, 28 U.S.C. § 1651(a), which permits federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions," did not provide a source of jurisdiction to enter the anti-suit injunction. *See* 491 F.3d at 364-65; *see also Syngenta Crop. Prot., Inc. v. Henson,* 537 U.S. 28, 33, 123 S.Ct. 366, 154 L.Ed.2d 368 (2002) (stating that "the All Writs Act does not confer jurisdiction on the federal courts"). Nor did the Eighth Circuit find any other source of jurisdiction to support the anti-suit injunction.

While "[t]he boundaries of ancillary jurisdiction are not easily defined and the cases addressing it are hardly a model of clarity," *Garcia v. Teitler,* 443 F.3d 202, 208 (2d Cir.2006), we conclude that federal courts have continuing jurisdiction, grounded in the concepts of *res judicata* and collateral estoppel, to enjoin a party properly before them from relitigating issues in a non-federal forum that were already decided in federal court. This source of jurisdiction remains even after a judgment has been satisfied-regardless of whether (1) the judgment is one of dismissal or (2) the font of jurisdiction for such an injunction is characterized as "ancillary" or

otherwise.[18] *See, e.g., Choo,* 486 U.S. at 147, 108 S.Ct. 1684 ("[A] federal court [may] prevent state litigation of an issue that previously was presented to and decided by the federal court. [This power] is founded in the well-recognized concepts of *res judicata* and collateral estoppel."); *Id.* at 150-51, 108 S.Ct. 1684 (affirming anti-suit injunction protecting from relitigation a ruling in earlier federal judgment of dismissal); *Local Loan Co. v. Hunt,* 292 U.S. 234, 239, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) ("That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled."); *Smith,* 399 F.3d at 431-36 (affirming anti-suit injunction based on judgment dismissing claims as time-barred); *Paramedics,* 369 F.3d at 654 ("An anti-suit injunction may be needed to protect the court's jurisdiction once a judgment has been rendered."); *see also Covanta Onondaga,* 318 F.3d at 398 ("Even in the absence of a pattern of vexatious litigation ... a district court that has adjudicated the merits of a case may have authority to prevent relitigation."); 18 James Wm.

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[18] *Peacock*'s statement that federal courts' power to engage in "supplementary proceedings *involving third parties* to assist in the protection and enforcement of federal judgments" does not "extend[ ] beyond attempts to execute, or to guarantee eventual executability of, a federal judgment,"516 U.S. at 356-57, 116 S.Ct. 862 (emphasis added), does not affect our analysis. Pertamina is not a third party, and the injunction was not entered merely to facilitate execution of the federal judgment. Rather, the injunction was entered to *protect* the federal judgment from being undermined or vitiated in foreign proceedings *by a party before* the District Court.

Moore, *Moore's Federal Practice* § 131.53 (perm. ed.2006) (noting that "a district court retains jurisdiction to enforce the judgments it enters"); 17A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4226 (perm. ed. 2007) ("No independent basis of jurisdiction is required for a federal court to entertain an application to enjoin relitigation in state court.").

Accordingly, we conclude that the District Court retained-and retains-continuing jurisdiction to maintain the anti-foreign-suit injunction even though the federal judgments against Pertamina have been satisfied. While an anti-foreign-suit injunction should not be made permanent absent a need for such relief, *see, e.g., Ibeto Petrochemical,* 475 F.3d at 65 (modifying injunction where there was "no need for the permanent injunction that the District Court seems to have issued"),[19] entry of a permanent injunction was fully justified in this case. Were we to vacate the District Court's injunction, Pertamina would be free to engage in vexatious proceedings that, as discussed, are intended to undermine or vitiate federal judgments; the District Court did not err in determining that a permanent injunction was necessary in these circumstances.

D. The Injunction Should Be Modified Slightly

Although the injunction could be read to bar any

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[19] Moreover, as *Goss* suggests, a federal court may in some circumstances (not presented here) have a diminished need for an anti-suit injunction to protect a judgment once ancillary proceedings to satisfy the judgment have run their course.

other action related to the Award, the parties agree that the injunction does not bar confirmation proceedings currently underway in other nations. It would be inconsistent with our obligations under the Convention to bar good-faith litigation over the Award in Switzerland, the jurisdiction with primary authority over the Award.[20] Accordingly, we modify the injunction slightly to clarify that the injunction has, no effect on confirmation proceedings contemplated by the New York Convention in other jurisdictions, and moreover, permits Pertamina to return to the District Court to seek relief from the injunction in the event that it demonstrates its good faith in seeking an opportunity to challenge the Award in Switzerland. *Cf. Smith,* 399 F.3d at 436 (modifying anti-suit injunction to avoid having it "inadvertently sweep too broadly").

For the reasons stated above, the judgment of the District Court is affirmed as modified.

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[20] While there is no indication that Pertamina could return to Switzerland in order to seek annulment of the arbitration award, KBC could not say definitively at oral argument that Pertamina would be time-barred from seeking to annul the Award in that jurisdiction on the basis of the alleged fraud. [Hr'g Tr. 53]

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF AN ARBITRATION BETWEEN
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("PERTAMINA"),
Respondent.

21-MC-00098 (TPG)

December 19, 2006

Order and Judgment Granting Declaratory and Injunctive Relief

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On December 8, 2006, this Court issued an Opinion granting KBC's Motion for Injunction Concerning Litigation in the Cayman Islands (the "Motion"). In accordance with that Opinion, which is attached hereto and made a part hereof, it is hereby ORDERED AND ADJUDGED, effective immediately:

1. The Court hereby declares that all sums paid or turned over to KBC as a result of proceedings

before this Court in satisfaction of the Final Arbitral Award issued on December 18, 2000 (the "Arbitral Award") (such sums, the "Award Proceeds") are the property of KBC, and that KBC may use or dispose of the Award Proceeds in any manner, including, without limitation, distribution by KBC to its members and stakeholders.

2. Pertamina is hereby permanently enjoined from prosecuting, proceeding with, or otherwise taking any actions in support of the lawsuit it commenced against KBC in the Grand Court of the Cayman Islands (the "Cayman Islands Court") on or about September 15, 2006 (such lawsuit bearing Cause No. 386 of 2006) and Pertamina is hereby ordered to immediately (a) provide a copy of this Order and Judgment to the Cayman Islands Court, and (b) file appropriate papers in the Cayman Islands Court seeking a stay of that lawsuit until a decision is made on any appeal of this Order and Judgment. In the event that the Court of Appeals affirms this Order and Judgment (or in the event no appeal is timely taken), Pertamina shall within ten days file appropriate papers in the Cayman Islands Court voluntarily dismissing that lawsuit with prejudice.

3. Pertamina is hereby permanently enjoined from making a claim or commencing an action in any court or tribunal claiming injury resulting from the Arbitral Award or seeking to recover, by way of an award of damages or otherwise, the Award Proceeds or any other sums or losses allegedly incurred as a result of the Arbitral Award.

4. Pertamina is hereby permanently enjoined from making a claim or commencing an action in any

court or tribunal seeking to annul, amend, or modify the Arbitral Award, except that Pertamina may continue to raise any defenses it may have against the enforcement of the Arbitral Award in any proceedings initiated by KBC to enforce the Arbitral Award in other jurisdictions.

5. Pertamina is hereby permanently enjoined from commencing any action or making any motion seeking relief from the Final Judgment entered by the United States District Court for the Southern District of Texas on December 4, 2001 and registered in this Court on February 22, 2002.

6. Pertamina is hereby permanently enjoined from making or prosecuting any request for an order or injunction that would interfere with KBC's use or disposition of the Award Proceeds, including, without limitation, applying for a Mareva Injunction. Nothing in this Order and Judgment should be construed, however, as preventing Pertamina from raising and pursuing any defenses and/or objections that it may have in connection with proceedings initiated by KBC in other jurisdictions. In particular, nothing in this Order should be construed as preventing Pertamina from raising defenses and/or objections or otherwise litigating (including, without limitation, pursuing appeals and seeking costs and attorneys' fees) against KBC in connection with proceedings initiated by KBC (prior to the filing of KBC's Motion) in the jurisdictions of Canada (such proceedings bearing Action No. 0203 3768, in The Court of Queen's Bench of Alberta, Judicial District of Edmonton), Hong Kong (such proceedings bearing case number HCCT 28/2002 and appeal number CACV 121/2003), and Singapore (such proceedings

corresponding to Originating Summons No. 342 of 2002/Y). In the event that Pertamina violates this Order and Judgment and obtains an order of any court, tribunal, or other body purporting to interfere with KBC's right to dispose of the Award Proceeds, KBC shall be under no obligation to comply with such order.

7. This Order and Judgment supersedes the following orders, each of which is hereby and immediately vacated: (a) the September 27, 2006 Order of this Court (Docket No. 169), and (b) the September 27, 2006 Memorandum of this Court.

8. This Order and Judgment constitutes a final decision of this Court within the meaning of 28 U.S.C. § 1291.

9. This Court expressly retains jurisdiction of this matter for purposes of enforcing this Order and Judgment to the fullest extent permitted under the Constitution and laws of the United States.

10. The Court will entertain a motion by Pertamina for a stay pending appeal in accordance with Rule 62(c) of the Federal Rules of Civil Procedure or any other applicable provision of law. Any such motion must be made in writing within five days of the date of entry of this Order and Judgment. Pending this Court's adjudication of any such motion, KBC shall continue to hold the Award Proceeds in the manner provided in the September 27, 2006 Memorandum.

Dated this 19th day of December, 2006

/s/

Thomas P. Griesa
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of An ARBITRATION BETWEEN KARAHA BODAS COMPANY, L.L.C., *Petitioner*,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("PERTAMINA"), *Respondent*.

No. 21-MC-00098 (TPG)

Dec. 8, 2006

Christopher F. Dugan, Paul, Hastings, Janofsky & Walker LLP, Washington, DC, for Petitioner.

Henry Weisburg, Shearman & Sterling LLP, New York City, for Respondent.

GRIESA, District Judge.

Karaha Bodas Company ("KBC") moves for an order prohibiting Pertamina from engaging in certain legal proceedings in the Cayman Islands and from initiating similar proceedings in other jurisdictions. The motion is granted. In addition, the Court will enter a declaratory judgment based on certain conclusions reached in this opinion.

Facts

The Arbitral Award

In 1994 KBC, a Cayman Islands limited liability company formed by two American power companies and other investors, executed two contracts with Pertamina, an oil and gas company owned and controlled by the Republic of Indonesia. The contracts established a joint venture for the exploration of geothermal energy resources in the Karaha area of West Java, Indonesia. In 1997 the projects were suspended by Indonesian Presidential Decrees. As a result, on April 30, 1998, KBC commenced arbitration proceedings in Switzerland for breach of contract by Pertamina. On December 18, 2000, the Tribunal awarded KBC $261.1 million.

In February 2001 Pertamina attempted to challenge the award in the Swiss Supreme Court, on grounds that are not explained on the record in the present motion. The Swiss court denied Pertamina's application for failure to timely pay court fees. Pertamina next challenged the award in the Jakarta District Court in Indonesia. The Jakarta court granted Pertamina's request to annul the award in August 2002, but on March 23, 2004, the Indonesian Supreme Court reversed.

Confirmation Proceedings in the United States

In early 2001, KBC brought an action in the United States District Court for the Southern District of Texas to confirm the Arbitral Award. On December 4, 2001, that court granted summary

judgment in favor of KBC and confirmed the award. Pertamina filed a notice of appeal, and a year later-months after the briefing on the appeal was concluded-Pertamina moved under Fed.R.Civ.P. 60(b) in the Texas district court to set aside the judgment. Pertamina sought to set aside the judgment because (1) there was newly discovered evidence of political risk insurance coverage pursuant to which KBC's investors were paid $75 million and (2) the Jakarta District Court annulled the underlying Arbitral Award in August 2002. The Fifth Circuit remanded the case to the district court to consider the merits of the Rule 60(b) motion. The district court denied Pertamina's motion in two separate opinions on April 16 and May 30, 2003. The Fifth Circuit on March 23, 2004, affirmed both the district court's December 2001 judgment and the Rule 60(b) decisions of 2003. On October 4, 2004 the United States Supreme Court denied certiorari.

Pertamina's Claim of Fraud

Pertamina claims that KBC committed fraud in connection with the joint venture and the arbitration. It is important to note that Pertamina's claim of fraud was not presented in the arbitration itself or in any of the proceedings described above in the Swiss Supreme Court, the Jakarta District Court, the Southern District of Texas, the Fifth Circuit, or the United States Supreme Court. However, the fraud claim was presented in certain proceedings in Hong Kong and Singapore, as will be described. More importantly, Pertamina's claim of fraud is the basis of its action in the Cayman Islands, which is the subject of the present motion.

Specifically, Pertamina alleges that KBC fraudulently overstated the size of geothermal resources in 1997 and relied on those falsehoods in the arbitration proceedings. In its Statement of Claim dated October 6, 2006, filed with the Cayman Islands court, Pertamina attempts to present a detailed list of the specifics of the alleged fraud. But the details all relate the basic claim that KBC overstated the size of geothermal resources. It should be noted that, although there is no indication that the claim of fraud was literally presented to the Arbitral Tribunal, the issue of the quantity of geothermal resources was surely put forward. Paragraph 129 of the Final Award describes the fact that Pertamina claimed that the representations made by KBC "were suspect since the quantities of reserves indicated" in one analysis by KBC "had been significantly increased without justification" in a later analysis. In paragraph 131, the Arbitral Tribunal recognizes the possibility that the amount of reserves put forward by KBC may have been overestimated, and states that the Tribunal would give weight to this circumstance in making the allowance for lost profits. The result was that, whereas KBC had claimed lost profits of $512.5 million, the Tribunal, in paragraph 136, only awarded $150 million.

Pertamina asserts that its claim of fraud is based upon new evidence. There is an issue about when Pertamina knew, or should have known, about this alleged new evidence. Such evidence is in fact contained in documents turned over to Pertamina by KBC. The parties dispute when the documents were

received by Pertamina. KBC claims that the documents were turned over in March 2001, when KBC relinquished its offices and files to Pertamina. However, Pertamina insists that the documents were not received until November 2002, when a KBC employee delivered twelve boxes of documents to Pertamina's Geothermal Office. Regardless, Pertamina asserts that "no one looked through them until August 2005 when Pertamina's advisors came and inspected them" (Statement of Bambang Kustono, October 13, 2006).

Foreign Confirmation/Registration Proceedings

In addition to bringing the action in the federal court in Texas, KBC brought confirmation/registration proceedings in Hong Kong, Singapore and Canada. On March 27, 2003, the Hong Kong court granted KBC's application to register the award and denied Pertamina's attempt to set it aside. An appeal was partially heard in December 2003, but the appeal was adjourned pending the outcome of the Fifth Circuit's decision in the United States. The appeal was scheduled to be heard in February 2006. Pertamina filed a Supplementary Notice of Appeal, including allegations of fraud. The exact status of that matter is not clear. However, KBC recovered $898,682.90 in Hong Kong to be applied to the amount owed by Pertamina under the Arbitral Award.

On March 14, 2002 the High Court of the Republic of Singapore granted KBC's application to register its award. Pertamina's application to set

aside the order, also filed in 2002, was held in abeyance pending the outcome of proceedings in the United States. In late January 2006, Pertamina informed the Singapore court of its fraud allegations in a conference. KBC made various applications to the Singapore court in an attempt to defer further litigation until after the termination of proceedings in the United States, but the court denied KBC's applications. Eventually, KBC voluntarily dismissed its action in Singapore.

On December 8, 2004, a Canadian court granted summary judgment in favor of KBC and confirmed the award. Pertamina's appeal is currently still pending. There is no indication that Pertamina has brought up its fraud allegations in the Canadian proceeding.

Execution Proceedings in the Southern District of New York

When Pertamina appealed the Texas district court's decision in early 2002, it declined to file a supersedeas bond pursuant to Fed.R.Civ.P. 62(d) in order to obtain a stay of the judgment pending appeal. As a result, KBC sought and was granted permission by the district court to register its judgment in other judicial districts in the United States under 28 U.S.C. § 1963. On February 22, 2002, KBC registered its Texas district court judgment with the United States District Court for the Southern District of New York, and commenced execution proceedings. On the same day, the Southern District issued ex parte writs of execution permitting KBC to serve restraining notices upon a

number of banks in New York, and also served orders on Pertamina to show cause why KBC could not execute upon any property of Pertamina within this jurisdiction in satisfaction of the judgment. KBC promptly issued notices to, inter alia, the Bank of America and the Bank of New York to restrain funds flowing through twenty-four trust accounts maintained in Pertamina's name at those banks in this district.

In March 2002, the Ministry of Finance of the Republic of Indonesia filed a motion to quash the restraining notices and the writs of execution arguing that it-and not Pertamina-owned the restrained assets. To the extent that Pertamina owned the funds, KBC could have execution on its judgment, but only to that extent. On April 24, 2002, this Court held that, with respect to fifteen of the twenty-four accounts, Pertamina only owned a portion of the funds in the accounts. The fifteen accounts ("Adjudicated Accounts") contained revenues from the sale of Liquefied Natural Gas, and the Court held that Pertamina only had a property right in those funds to the extent of its Retention Fee. The remainder belonged to the Ministry. The Retention Fee, explained in detail in other opinions of this Court, is Pertamina's share of income from projects it undertakes with private contractors. Additionally, the Court noted that the record was insufficient to determine ownership of the funds in the remaining nine accounts. The Court certified the April 24 order for immediate appeal and stayed it pending the appeal. The stay prevented actual disbursement to KBC. The Second Circuit affirmed on December 10, 2002, but ordered this Court to

continue the stay until the parties' rights in all of the funds were determined.

After the Second Circuit's December 2002 ruling, Pertamina and the Ministry sought to limit the amount of the Retention Fees subject to the restraining notices by contending that the effect of the restraining notices as to the Adjudicated Accounts ceased in June 2002, rather than continuing through that year and thereafter, as argued by KBC. This issue was raised in motions made, briefed, and argued in 2003 in this Court. In an opinion on January 29, 2004, this Court held that the effect of the restraining notices did not terminate in June 2002, but continued through 2002 and into 2003, and would continue, until the amount of the judgment plus interest was secured.

On April 6, 2004, KBC filed a "Motion for Turnover of Retention Fees Accrued Through November 2003." This motion was precipitated by a November 21, 2003 letter sent from the Ministry to the Governor of the Bank of Indonesia terminating the payment of Retention Fees to Pertamina. More importantly, Pertamina and the Ministry took the position that the letter was a confirmation of prior legal enactments, which had already terminated the Retention Fees as of January 1, 2003. KBC argued to the contrary. On May 19, 2004, this Court held that Pertamina earned Retention Fees through November 21, 2003. The Court noted that the positions taken by Pertamina and the Ministry during all of the 2003 litigation were contrary to the position it now took in opposition to the Turnover Motion and as a result its assertion on the Turnover Motion could be given no

weight. KBC's motion was granted but the Court ordered the actual turnover stayed in accordance with its previous orders.

On October 6, 2004, after two days of argument and testimony, the Court held that the funds restrained in the remaining "unadjudicated" accounts belonged to Pertamina. Then, on October 22, this Court issued its final judgment ordering a turnover of the amount of the award plus interest to KBC, but stayed the award pending appeal. The Second Circuit summarily affirmed the judgment on March 9, 2006. Pertamina then applied to the Supreme Court for certiorari.

KBC had moved to impose sanctions on Pertamina and its attorneys. Oral argument on this motion was held on August 25, 2006. In the course of the hearing, the Court asked whether, if the Supreme Court denied certiorari, the funds restrained in New York would be paid to KBC and there would be "no further issue." (Minutes pp. 14-15). The attorney for KBC replied that there was a further issue that had come up recently in the proceedings brought by KBC in Singapore, where Pertamina raised the claim that KBC had obtained the Arbitral Award by fraud. The KBC attorney said that Pertamina had told the court in Singapore that if that court issued a finding of fraud, Pertamina "was going to start a new action in the United States to try to recover all the funds that had been paid, a new fraud action in the United States." In the sanctions hearing, the Court then questioned counsel for Pertamina:

> [W]hat about that? Is there any intention to have further litigation, or can we end it? If the Supreme Court denies cert., will the money simply be paid to KBC or not?

The Pertamina attorney replied that he had no instructions to commence an action. The Court then asked for a more definite statement of Pertamina's position, as follows:

> The question is, and I have absolutely a good reason for asking such a question in view of the record here, I want to know, assuming that the Supreme Court denies cert., I want to know if Pertamina will now agree to the payment of the judgment, which would mean the release of the funds which are now held to secure that judgment, immediate release.

(Minutes pp. 16-17). On August 28, 2006 the attorney for Pertamina wrote the Court as follows:

> Pursuant to the Court's direction, we are writing to address the question posed by the Court at last Friday's hearing with respect to the payment of the outstanding portion of KBC's judgment by Pertamina. Our understanding of Your Honor's question is whether, in the event that the Supreme Court denies the petitions for certiorari filed by Pertamina and the Ministry of Finance of the Republic of Indonesia, Pertamina will agree to the payment of KBC's judgment. We have been instructed by Pertamina to inform the Court and counsel for KBC that, in the event that

> the Supreme Court denies the pending petitions, and assuming that the Court issues a turnover order with respect to the restrained funds appropriate in form and amount, Pertamina will not object before this Court to the payment of the judgment.

On October 2, 2006 the Supreme Court denied Pertamina's certiorari petition.

The Cayman Islands Action

A little over two weeks after the August 28 letter, on September 15 Pertamina commenced an action against KBC in the Grand Court of the Cayman Islands for fraud in connection with the joint venture and the arbitration. Pertamina's New York attorney wrote the Court on September 19, 2006 stating that he was "unaware on August 25 that such a proceeding was planned." Presumably the attorney meant August 28, the date of his letter. However, there can be no doubt about the fact that Pertamina was planning the Cayman Islands action as of August 28, and probably for a substantial period of time before that. Also, there can be no doubt about the fact that both Pertamina and its attorneys knew full well that the Court's questions were directed to finding out whether the Supreme Court's denial of certiorari would mean final termination of all litigation, so that KBC could be paid out of the funds restrained in New York. Obviously the Court did not know enough to ask specifically if Pertamina planned to bring a new action in the Cayman Islands. But an honest look at the Court's inquiry and an honest response would have led to the disclosure of the plan

to bring such an action.

There was, of course, no such disclosure. The circumstances strongly support an inference that concealment by Pertamina was deliberate and with a purpose. Now that an action has been brought, Pertamina is asserting that this Court cannot interfere with such an action because such interference would tread on the sovereignty of a foreign state. Had the plan for an action been disclosed beforehand, there may well have been legal issues about how to deal with Pertamina's strategy, but the case law about anti-suit injunctions, now relied on by Pertamina, would not have been directly applicable.

Pertamina alleges in the Cayman Island action that KBC overstated the size of geothermal resources in 1997 and relied on those falsehoods in the arbitration proceedings. The statement of plaintiff's claim in the action is contained in the Writ of Summons, dated September 15, 2006, and signed by Pertamina's Cayman Islands attorney. Pertamina claims that the fraud of KBC affected various notices issued by KBC to Pertamina in 1997. Pertamina further contends that KBC was guilty of fraud in presenting the Notice of Arbitration dated April 30, 1998 and in the procuring of the Arbitral Award dated December 18, 2000, and that the fraud was "such as to vitiate the Arbitral Award." (Writ of Summons ¶ 1). Pertamina seeks damages, accounting, and restitution, as well as

> An injunction restraining the defendant ... from (i) dealing with or disposing of, in any

> manner whatsoever, any sums received ... as a consequence of the said fraud ... and (ii) taking any steps whatsoever in furtherance of the said wrongs including ... commencing or continuing or prosecuting or assisting in the prosecution of any proceedings directed to enforcing, whether by themselves or by assignment, and/or from receiving the benefit by enforcing, the Arbitral Award.

(Writ of Summons ¶ 9). On September 21 Pertamina filed an Amended Summons with the Cayman Islands court, requesting

> That the defendant ... be restrained until the conclusion of the trial of this action or further order in the meantime from taking any steps to dispose or direct the disposal of any funds belonging to or in the name of or due to Plaintiff [Pertamina] collected or received by way of enforcement of the Arbitral Award dated 18 December 2000 entered in favor of Defendant [KBC] against the Plaintiff following the initiation of arbitration proceedings by the Defendant through the Notice of Arbitration dated 30 April 1998, ...

(Am. Summons ¶ 2). The Amended Summons also requests that KBC be restrained in the terms of an attached Draft Order. This Draft Order, entitled "Injunction Prohibiting Disposal of Assets Worldwide," would prohibit KBC from disposing of its assets up to $316 million, whether in or outside the Cayman Islands, and specifically includes within the definition of assets, "any sums received or to be

received by the Defendant pursuant to any order of the United States District Court for the Southern District of New York ... pursuant to proceedings issued by the Defendant directed to enforcing the Arbitral Award."

Other materials relating to the Cayman Islands action, which have been filed by Pertamina on the current motion before the Southern District, are as follows:

> Affidavit of Simson Panjaitan, dated September 21, 2006.
>
> "Skeleton Argument," dated September 22, 2006.
>
> Amended Writ of Summons, dated October 6, 2006.
>
> Statement of Claim, dated October 6, 2006.

As will be described more fully later in this opinion, an important, and perhaps essential, argument of Pertamina in opposing KBC's current motion is that the action in the Cayman Islands is not to set aside the Arbitral Award, but is "a totally new fraud claim." What has just been quoted from the pleadings in the Cayman Islands action bears, of course, on that issue. In addition, the Court notes the portion of the document entitled "Skeleton Argument," dealing with the remedies sought in the Cayman Island proceedings. According to paragraph 7 of that document, Pertamina is seeking damages and ancillary orders. The damages sought are the amount

of the Arbitral Award, Pertamina's costs in the arbitration, and interest on those sums. As to ancillary orders, paragraph 7 states that "a finding of fraud would mean that the award is vitiated by fraud and a nullity," which "would preclude any further enforcement actions by KBC." Pertamina seeks to have the Cayman Islands court "restrain KBC from taking any such steps."

The Amended Writ of Summons, dated October 6, 2006, is the same, in all material respects, as the original Writ of Summons, and contains the same language quoted from the original Writ of Summons earlier in this opinion.

The Statement of Claim, dated October 6, 2006, contains a section entitled "Particulars of Loss and Damage" in paragraph 54. These are consistent with what is in the Skeleton Argument.

The Current Motion

On September 21, 2006 KBC filed its motion in the Southern District requesting an order prohibiting Pertamina from engaging in legal proceedings in the Cayman Islands. In its brief Pertamina expanded the motion to embrace any similar actions in other jurisdictions. Oral argument was held on September 26.

During the argument, counsel for Pertamina represented that by bringing suit in the Cayman Islands, Pertamina was not seeking to interfere with the mechanisms of this Court and stated that Pertamina would not oppose the turnover of funds to

KBC in the event that the Supreme Court denied certiorari. However, counsel did not agree that Pertamina would withdraw the claim that the fraud vitiated the Arbitral Award. Moreover, counsel took the position that Pertamina (while agreeing, through New York counsel, to have the funds turned over to KBC) was free to petition the Cayman Islands court to enjoin KBC from distributing or disposing of the funds that it received from the litigation in the federal court in New York.

In view of the uncertainty as to how quickly the Cayman Islands court might move, at least with respect to provisional relief, the federal court at the September 26 oral argument issued an immediate order, which was in effect a temporary restraining order. This was embodied in a formal order of September 27, as follows:

> 1. Pertamina agrees to, and this court orders, that Pertamina is prohibited from making, or proceeding with any request to the courts in the Cayman Islands (or any other forum) [for] an order or injunction that would interfere with the procedures of this court in enforcing the arbitration award, including turnover of restrained funds in the even that certiorari is denied by the Supreme Court.
>
> 2. Pertamina is prohibited from making, or proceeding with any request to the courts in the Cayman Islands (or any other forum) seeking any order or injunction against KBC interfering with KBC's use or disposition of funds that may be turned over to it as a result

of the proceedings in this court.

The Court did not make a final decision on KBC's motion, but reserved decision. The present opinion constitutes the Court's decision on that motion.

As noted above, on October 2, 2006 the Supreme Court denied certiorari. Prior to this time a total of $55,243,209.70 had been paid to KBC out of the funds restrained in New York. As noted earlier, KBC recovered $898,682.90 in Hong Kong. After the Supreme Court action, KBC requested that the additional sum of $260 million be turned over to KBC from the funds restrained in New York. A small additional amount was thought to be due when the final calculations were made, but KBC wished to have immediate payment of $260 million. Accordingly, on October 6 the Court signed an Interim Turnover Order directing that $260 million be turned over to KBC immediately. However, this was subject to the direction the Court had issued in a memorandum of September 27 to the effect that KBC could not distribute these funds without further permission of the Court. The purpose of this was to allow the Court to make a final ruling on KBC's motion, and specifically to deal with Pertamina's claim that it could use the Cayman Islands action to prevent KBC from disposing of the funds. KBC had represented to the Court that it would, if allowed to proceed normally, distribute the funds as dividends to the owners of KBC.

On November 15, 2006 a Stipulation and Order was entered, providing for the payment of a final $3,469,268.43 to KBC. This finally satisfies the

judgment. A grand total of $319,611,161.03 has been paid. The September 27 memorandum applies to both the $260 million and the $3,469,268.43, but not the $55,243,209.70, which is no longer in KBC's hands.

Discussion

The Nature of the Cayman Islands Action

In arguing the motion now before the Southern District, Pertamina lays considerable emphasis on the idea that Pertamina is not suing in the Cayman Islands to set aside the Arbitral Award, but is making a "new fraud claim" for damages. At the argument of the motion on September 26, 2006, the Court asked if the action in the Cayman Islands was the first time that Pertamina engaged in affirmative litigation to set said the Arbitral Award for fraud, as distinct from using fraud allegations to defend enforcement proceedings by KBC. (Minutes pp. 36-37). Counsel for Pertamina responded as follows:

> But I would disagree, your Honor, the action in Cayman is not to set aside the arbitration award. It's a totally new fraud claim, as I understand it.

* * * * * *

> No, it is to-it is a damage claim, your Honor, it is to get damages for an alleged fraud.

(Minutes p. 38).

It is not entirely clear why Pertamina seeks to make this distinction. The Cayman Islands action is what it is, and labels do not change it. In any event, the theory that the Cayman Islands action is nothing but a "new fraud claim," merely seeking damages is wholly without substance.

To be sure, Pertamina alleges fraud in the Cayman Islands court. However, the entire point of the fraud allegations is to show that the Arbitral Award must be deemed to be vitiated- i.e., to be a nullity. The "damages" sought are almost entirely the amount of the Arbitral Award plus the interest which has accrued during enforcement proceedings.

Although counsel for Pertamina stated at the September 26 hearing that Pertamina has no intention to use the Cayman Islands action for the purpose of enjoining proceedings in the United States courts, that is exactly what is sought both in the original Writ of Summons and the Amended Writ of Summons.

It is true that there was very little left to enjoin, in connection with the proceedings in the United States courts, when the Cayman Islands action was commenced. But this does not take away from the fact that Pertamina filed suit in the Cayman Islands with the clear objective of stopping whatever could be stopped by way of legal proceedings to enforce the Arbitral Award. Pertamina is still seeking to achieve that objective.

At the time the Cayman Islands action was brought, Pertamina's petition for certiorari was still

pending before the United States Supreme Court. Of course, there was no attempt to have the Cayman Islands court interfere with what was going on in the Supreme Court. After the Supreme Court denied certiorari, all that was left was to have judgment entered directing that restrained funds be turned over to KBC to satisfy the Texas federal court judgment. In the August 28, 2006 letter, counsel for Pertamina had stated that "Pertamina will agree to the payment of KBC's judgment," in the event that the Supreme Court denied certiorari.

What was in fact left for Pertamina to restrain by way of the Cayman Islands action? In fact, Pertamina found something of great importance. In the Amended Summons of September 21, 2006 Pertamina requested the Cayman Islands court to issue an order to the effect that KBC would be restrained from disposing of any funds collected through the enforcement of the Arbitral Award.

But the basic nature of the Cayman Islands action was confirmed in the Amended Writ of Summons filed by Pertamina on October 6, 2006. This was after the Supreme Court had denied certiorari. It was after counsel for Pertamina had stated at the September 26 hearing that in the Cayman Islands action Pertamina was not seeking to interfere with the mechanisms of this Court. It was after an affidavit of a Pertamina officer filed with the Cayman Islands court, purporting to make the same point. Nevertheless the October 6 Amended Writ of Summons repeated the allegations and claims of the original Writ of Summons of September 15, contending that the Arbitral Award should be

considered "vitiated" and that KBC should be restrained from prosecuting any proceedings to enforce the Arbitral Award. This showed that the purpose of the Cayman Islands action was and still is to halt, in whatever way is available, the judicial proceedings in the United States and the consummation of those proceedings.

It should be noted that, out of the $319 million collected by KBC, as described earlier, approximately $55 million has already been distributed to the owners of KBC. The sum of approximately $263 million, recently turned over to KBC is still in KBC's hands. It is this amount which would be reached if the Cayman Islands court entered an order restraining KBC from disposing of funds.

It is apparent beyond question that the effort to prevent KBC from using the money, as a full owner of such money, is part and parcel of the attempt to nullify the Arbitral Award. If the action in the Cayman Islands were about some completely unrelated matter, and the effort to restrain KBC from disposing of the funds were for the purpose of securing a judgment in such unrelated matter, that would be a completely different situation. But the Cayman Islands actions is all about defeating KBC's Arbitral Award, and is about preventing KBC from realizing the funds of that award.

Beyond this, the Cayman Islands action has the obvious purpose of nullifying the judgment of the federal court in Texas confirming that award and the judgments of the Southern District of New York, allowing KBC to recover from funds restrained in

New York. The objective of the Cayman Islands action is to prevent the completion and consummation of the carrying out of those judgments.

Remedies to Vacate Judgment

As was just explained, Pertamina is in effect seeking to overturn not only the Arbitral Award, but the judgments of the federal courts in Texas and New York. To do so, Pertamina has commenced the action in the Cayman Islands. KBC, at least at the present, is not relying upon the presentation of defenses to the Cayman Islands court. KBC is moving in the Southern District of New York to prevent Pertamina from going forward with its Cayman Islands suit. This necessarily requires consideration of the judicial authorities relating to anti-suit injunctions. These authorities will be discussed in the next section of this opinion. However, the Court has thought it instructive to discuss United States law regarding the ability of a judgment creditor to set aside the judgment against him on grounds of fraud.

Fed.R.Civ.P. 60(b)(3) allows a motion to be brought to relieve a party from a final judgment for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." A party bringing a Rule 60(b)(3) motion must establish by clear and convincing evidence "(1) that the adverse party engaged in fraud or other misconduct, and (2) that this misconduct prevented the moving party from fully and fairly presenting his case." *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 641 (5th Cir.2005). Additionally, Rule

60(b) requires that the motion be brought in the court that rendered the judgment, within one year of the judgment.

Rule 60(b) goes on to provide:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

It should be noted that the reference to 28 U.S.C. § 1655 has no relation to the present case. It concerns the enforcement of liens against absent defendants.

The provision for "an independent action" is designed to preserve the traditional remedy in equity to overturn judgments. 12 Moore's Federal Practice § 60.80. The most common ground asserted in independent actions is fraud. *Id.* § 60.81. Although it is not entirely clear from the text, the drafters of the rule apparently intended to distinguish between an "ordinary" independent action for fraud, and an action charging "fraud on the court," although the two are (understandably) sometimes confused. *Id.* §60.81[1][b] [v]. "Fraud upon the court" refers to matters such as the bribery of a judge, jury tampering, or fabrication of evidence by an attorney. Illustrative cases are *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); *Root Refining Co. v. Universal*

Oil Prods. Co., 169 F.2d 514 (3d Cir.1948); and *Platt v. Threadgill*, 80 F. 192 (C.C.W.D.Va.1897). It appears that the general provision about "an independent action" may allow claims of fraud on a broader basis. However, for reasons that will appear, it is not necessary in the present case to be concerned about the possible distinctions in the rule or about the exact boundaries of an independent action seeking to set aside a judgment for fraud.

The important thing, for present purposes, is to recognize that the use of an independent action to set aside a judgment for fraud has definite limitations under the decided cases. The Supreme Court has stated in *United States v. Beggerly:*

> Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of "injustices which, in certain instances, are deemed sufficiently gross to demand a departure" from rigid adherence to the doctrine of res judicata. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

524 U.S. 38, 46, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998). The Supreme Court went on to state that "an independent action should be available only to prevent a grave miscarriage of justice." 524 U.S. at 47, 118 S.Ct. 1862. The Court reversed the vacating of a judgment, finding in that case that the failure to thoroughly search for certain records and to make full disclosure to the court rendering the judgment did not amount to grave miscarriage of justice. *Id.*

The Court did, however, cite *Marshall v. Holmes,* 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870 (1891), to illustrate when setting aside a judgment for fraud would be justified. There a judgment had been obtained by means of a forged letter.

The courts also adhere to the equitable rule that there must be a showing of no adequate remedy at law. *Cresswell v. Sullivan & Cromwell,* 922 F.2d 60, 71 (2d Cir.1990). The Second Circuit stated in *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*,

> It is fundamental that equity will not grant relief if the complaining party has, or by exercising proper diligence would have had, an adequate remedy at law, or by proceedings in the original action ... to open, vacate, modify, or otherwise obtain relief against, the judgment.

117 F.3d 655, 662-663 (2d Cir.1997). Also, the party seeking relief must comply with the equitable "clean hands" standard. 12 Moore's Federal Practice § 60.82[2].

Although there is no statute of limitations for an independent action, the equity doctrine of laches applies. *Simons v. United States,* 452 F.2d 1110, 1116 (2d Cir.1971); 12 Moore's Federal Practice § 60.83.

It is obvious that the defenses and limitations just described will generally be applied in the courts where actions are brought to set aside the judgments.

In the present case, of course, KBC is not arguing these points in the Cayman Islands, but is moving to have the Southern District of New York prohibit Pertamina from proceeding further in the Cayman Islands. It is the view of this Court that the law about the use of independent actions to overturn judgments must be considered on the issue of whether KBC's motion should be granted.

Anti-Suit Injunctions

There are well-defined limits on anti-suit injunctions against suits in foreign countries. These limits are based largely on considerations of international comity. But where a judgment has been entered in an American court, that court has authority to enjoin a party before it from suing in a foreign country where such suit is an abusive attempt to undermine that judgment.

Judge Mukasey of this Court has observed that, "after judgment in the domestic litigation, some showing of harassment, bad faith or other equitable circumstance is sufficient to support enjoining the foreign litigation." *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F.Supp.2d 118, 131 (S.D.N.Y.1997), *aff'd sub nom, Farrell Lines Inc. v. Ceres Terminals Inc.*, 161 F.3d 115 (1998). Similarly, the D.C. Circuit has stated that when "the injunction is requested after a previous judgment on the merits ... a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive relitigation." *Laker Airways Ltd. v. Sabena Belgian World Airlines,* 731 F.2d 909, 928 (D.C.Cir.1984).

On the other hand, Pertamina relies on a group of cases where courts have ruled that anti-suit injunctions should not be granted. *See e.g., China Trade & Dev. Corp. v. M.V. Choong Yong,* 837 F.2d 33, 36 (2d Cir.1987); *LAIF X SPRL v. Axtel, S.A. de C.V.,* 390 F.3d 194, 199 (2d Cir.2004). In those cases there were parallel proceedings occurring simultaneously in the United States and in a foreign forum. The principal case is *China Trade.* There, the Court was faced with a litigant who brought suit in Korea while the same issue was being litigated in the Southern District of New York. Emphasizing that parallel proceedings in two forums are "ordinarily tolerable" and should be allowed to proceed simultaneously, 837 F.2d at 36, the Court reversed the District Court's granting of the injunction. However, the holdings in *China Trade* and the other parallel proceedings cases, and what is referred to as "the *China Trade* test," are not applicable in the present case.

The case at hand is not a parallel proceedings case. Here judgments were entered in the American courts (Texas 2001 and New York 2004) well before the Cayman Islands action was commenced (September 2006). This is a case where the issue is whether there is a misuse of the foreign court to evade the American judgments. It is of interest that both Judge Mukasey and the D.C. Circuit gave consideration to international comity in accordance with the *China Trade* line of cases, but they acknowledged that a "more lenient standard" would apply once a judgment has been entered, and proceeded to speak decisively of the need to protect

against abusive foreign litigation mounted following entry of the American judgments. *Farrell,* 32 F.Supp.2d at 131; *see also Laker Airways,* 731 F.2d at 928; *Silva Run Worldwide Ltd. v. Gaming Lottery Corp.,* No. 96-Cv-3231, 2002 WL 975623, at *6-7, 2002 U.S. Dist. LEXIS 8307, at *20-21 (S.D.N.Y. May 8, 2002), *aff'd,*53 Fed. Appx. 597 (2d Cir.2002).

Aside from the need to protect against abusive foreign litigation, other considerations are relevant to the appropriateness of granting an anti-suit injunction. One concern is the need for the Court to protect its jurisdiction. Both *Laker Airways* and *China Trade* recognized the propriety of enjoining a suit in a foreign court where such an injunction is necessary to protect the American court's jurisdiction. *Laker Airways,* 731 F.2d at 927-31;China Trade, 837 F.2d at 36-37 (citing *Laker Airways,* 731 F.2d 909).

Another relevant consideration to this Court's ability to act in the face of comity considerations is the extent to which a litigant attempts to avoid the forum's important public policies. The D.C. Circuit commented that "deference to the foreign proceeding may be denied because of the litigant's unconscionable evasion of the domestic laws." *Laker Airways,* 731 F.2d at 931 n. 71. Indeed, the Second Circuit has held that "orders of foreign courts are not entitled to comity if the litigants who procured them have deliberately courted legal impediments to the enforcement of a federal court's orders." *Motorola Credit Corp. v. Uzan,* 388 F.3d 39, 60 (2d Cir.2004).

In the present case, Pertamina is seeking to

avoid the application of well-settled American law and policies about the limited methods which can be used to interfere with the normal finality of judgments.

It should be noted that KBC has once before sought an anti-suit injunction in this case. In March 2002, several months after the federal district court in Texas issued its final judgment in favor of KBC, Pertamina filed suit in Indonesia seeking to annul the Arbitral Award, and sought an injunction to prevent KBC from seeking to enforce the award. Before the application on the injunction was scheduled to be heard in Indonesia, KBC applied to the court in Texas for a temporary restraining order to prevent Pertamina from seeking its injunction in Indonesia. The district court granted KBC's application. Pertamina did not withdraw its request and the Indonesian court issued a provisional injunction. KBC then moved for a preliminary injunction against Pertamina's further pursuing the Indonesian action. The district court granted the injunction. The Fifth Circuit reversed. *Karaha Bodas Co., L.L.C., v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 335 F.3d 357 (5th Cir.2003).

The Fifth Circuit's opinion rested chiefly on the idea that the New York Convention, the operative treaty under which KBC sought to enforce its award, allows simultaneous enforcement and annulment proceedings in other countries. As a result, the United States courts "have discretion under the Convention to enforce an award despite annulment in another country." *Id.* at 369. Thus, the "Indonesian court's annulment fails to jeopardize the

enforcement of the award elsewhere." *Id.* The court reasoned that since there was no real threat to enforcement in the United States, comity counseled against issuing the injunction.

Clearly, the anti-suit injunction sought now by KBC presents itself in a much different procedural and temporal context. The policies underlying the New York Convention no longer apply. Pertamina is not seeking to annul the award under the New York Convention's procedures and has no need of protection of any right under such Convention. Pertamina is indeed seeking to "jeopardize the enforcement of the award" in the United States by means of the injunction it is seeking in the Cayman Islands. Finally, the litigation has proceeded to an entirely different juncture than where it stood in 2003. The significance of this will be dealt with later in this opinion. In short, the Fifth Circuit's decision is not instructive on what should be done now.

An Injunction Should Be Issued

As already described, the motion before this Court is to enjoin Pertamina from pursuing the litigation in the Cayman Islands and similar litigation elsewhere. It is not for this Court to deal with the merits of Pertamina's suit in the Cayman Islands, or to determine whether Pertamina's allegations of fraud do or do not have merit. However, this Court does have the responsibility of making certain findings with respect to the nature of the Cayman Islands action in relation to federal court judgments in the United States.

The previous section of this opinion, dealing with Fed.R.Civ.P. 60(b), illustrates the fact that under American law, a final judgment in a litigation is given a very high degree of protection, and can be overturned in a new and independent lawsuit only under exceptional circumstances, even when fraud is alleged. One of these circumstances is where "fraud upon the court" is proven. However, no such thing is alleged in the Cayman Islands. No claim is made there of forged evidence or bribery or anything else of that nature. What is claimed in the Cayman Islands is that, during the dealings between KBC and Pertamina, KBC made misrepresentations regarding the quantity of geothermal reserves or resources. As already described, the issue of the accuracy of KBC's representations on this subject was before the arbitrators. What has now occurred is that Pertamina claims it has new evidence showing that KBC defrauded Pertamina on the subject of the quantity of geothermal reserves or resources, something which Pertamina apparently did not literally allege in the arbitration. There is surely a serious question about whether the situation involves the kind of gross injustice or grave miscarriage of justice, demanding a departure from adherence to the doctrine of res judicata, within the meaning of the Supreme Court's holding in *United States v. Beggerly,* 524 U.S. 38, 46-47, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998).

But beyond this, it is necessary to reckon with the tactics employed by Pertamina. The alleged new evidence of fraud comes from documents voluntarily turned over by KBC to Pertamina in Indonesia. KBC asserts that the documents became available to

Pertamina in March 2001. Pertamina states that it was not until November 2002 when this happened.

It will be recalled that summary judgment confirming the Arbitral Award was issued by the federal court in Texas on December 4, 2001. If Pertamina had the documents in March 2001, as KBC claims, it had ample time to file a motion under Rule 60(b)(3) in the Texas district court within the one year time limit. And even if Pertamina did not have the documents until November 2002, the one year time limit had still not expired at that time. Furthermore, even after the expiration of that one year, a prompt filing of an "independent action" could have brought Pertamina's fraud allegations before the Texas district court.

Of course, Pertamina asserts that it did not look at the documents until August 2005, and therefore did not appreciate their significance until that time. Even if this is true, there is surely a serious problem about Pertamina's diligence. During the arbitration, Pertamina had raised suspicions about the amount of reserves which KBC had represented, and this was enough of an issue to cause the arbitrators to cut substantially the amount of the award for lost profits from what KBC had requested. The award was still very large ($150 million) and Pertamina has fought strenuously to prevent KBC from recovering even the reduced award. In view of this campaign against KBC, it is difficult to justify Pertamina's delay of three years or more in looking at documents left in its possession by KBC.

But even if it is assumed that Pertamina was

justified in waiting until August 2005 to discover the evidence now relied upon, what Pertamina did after that raises grave questions. Pertamina knew by then that recovery on the Arbitral Award would occur almost entirely by means of enforcement proceedings in the United States. Sufficient funds had been restrained in New York City, under process of the Southern District of New York, to provide over $300 million to pay the amount of the Arbitral Award plus interest. Although it was too late by August 2005 to file a motion under Rule 60(b)(3) to set aside the judgment of the district court in Texas, it was open to Pertamina to attempt an "independent action" under Rule 60(b). This would have been a direct and straightforward method to determine whether there was a right to overturn, on grounds of fraud, the Arbitral Award and the judgment based thereon.

However, Pertamina did no such thing. What it did was to raise its alleged fraud claim in Hong Kong and Singapore by way of defense against enforcement actions brought by KBC in those locations. But Hong Kong and Singapore had virtually no significance in the KBC-Pertamina contest. As it turned out only 3/10 of 1% of the judgment debt was collected in Hong Kong, and nothing in Singapore. Almost the entire judgment debt (99 7/10%) was paid from funds restrained in the federal court in New York, in proceedings based on the judgment of the federal court in Texas. Yet Pertamina made no move to submit the fraud claim to any court in the United States.

As is now known, Pertamina developed a different strategy to prevent collection of the 99 7/10% in the

United States. After 2 1/2 years of hard-fought litigation in the Southern District, a judgment was entered in that court on October 22, 2004, which would allow collection of the amount due of over $300 million. The Second Circuit affirmed the judgment on March 9, 2006. Pertamina then applied to the Supreme Court for certiorari. A decision on this certiorari petition was expected in early October 2006. The likelihood of the Supreme Court granting the petition was admittedly small.

At this point it appeared that the litigation between KBC and Pertamina was at long last about to be concluded. There was no indication of any remaining issues to be resolved, except in the unlikely event that the Supreme Court would review proceedings which had taken place in the Southern District of New York and the Second Circuit. However, in an attempt to head off possible further problems, the Court, in August 2006, asked counsel for Pertamina whether there would be any further issue which might come up following the likely denial of certiorari by the Supreme Court. On August 28, 2006 the attorney for Pertamina wrote the Court basically assuring the Court that a denial of certiorari by the Supreme Court would be the end, and specifically stating that Pertamina did not object to payment of the judgment.

Counsel for Pertamina has stated to this Court that he did not know, when he wrote that letter, that Pertamina planned to file the action in the Cayman Islands. But, of course, Pertamina knew. It deliberately concealed its plan from this Court and deliberately failed to have its attorney disclose that

plan in the August 28 letter. No other conclusion is possible.

A little over two weeks later, on September 15, 2006, Pertamina commenced the action in the Cayman Islands. Shortly thereafter, as expected, the Supreme Court denied Pertamina's certiorari petition.

It is significant that, on December 31, 2003, Alfred Rohimone, Pertamina's Finance Director, told the prominent Indonesian newspaper Komas that the arbitration decision could no longer be disputed, but that "what Pertamina is doing now is actually only buying time." Pertamina's tactics in the Cayman Islands action are completely consistent with "buying time." Even under Pertamina's own version, it knew of the so-called new evidence of fraud by late 2005. But it made no use of that evidence in a timely action in the United States where such an action would naturally have been brought if Pertamina had sought to litigate in a fair and direct fashion. Indeed, no timely action was brought even in the Cayman Islands. Instead, Pertamina held back, waiting until the very last moment before the litigation was to be terminated. It concealed its strategy from this Court in response to a direct inquiry, and then filed an action in a foreign court.

By suing in the Cayman Islands, Pertamina is not merely seeking a judgment in a foreign court with consequences in the foreign venue. The main objective of Pertamina is to have the Cayman Islands court reach out to the United States and frustrate the consummation of the long and difficult litigation

in the United States. It is true that KBC is a Cayman Islands limited liability company. But the court actions which have resulted in the recovery of $319 million by KBC, have occurred in the United States. Pertamina is seeking to have the Cayman Islands court enter orders preventing the completion and consummation of this United States litigation.

Pertamina takes the position that it is not seeking, through the Cayman Islands action, to interfere in any way with the jurisdiction or the processes of the American courts. According to Pertamina, since those processes have now been completed with final judgments and full payment to KBC of the judgment debt, no interference with or harm to the American proceedings can occur by merely having the Cayman Islands court prohibit KBC from disposing of the $263 million still in KBC's hands. This is the argument made by counsel for Pertamina at the September 26, 2006 hearing (Minutes pp. 20 et seq.). Counsel went on to urge that what is being pursued in the Cayman Islands is a "new claim based on new matter," and that Pertamina is merely asking the court to do something which is "an every day event" in courts-that is, to secure possible future judgments by an injunction or an attachment or a garnishment (Minutes pp. 24-25).

The problems with these theories are numerous. In the first place, the Cayman Islands action is not a new action in the sense of raising new issues unrelated to the United States proceedings. As pointed out earlier in this opinion, the entire premise of the Cayman Islands action is that the Arbitral

Award should be nullified, and that all proceedings to enforce that award should be stopped. Of course, by the time the Cayman Islands action was brought, the proceedings in the United States to enforce the Arbitral Award had been virtually completed. But Pertamina's pleadings in that action requested that all enforcement proceedings be halted by the Cayman Islands court. What that means, from a practical standpoint, is that the Cayman Islands court should take steps to stop whatever it is possible to stop in the way of enforcement proceedings. Moreover, there can be no doubt that the overall purpose of the Cayman Islands action is to cancel out what KBC has achieved in the United States courts by way of enforcement of the Arbitral Award. This is surely made clear by the fact that the "damages" sought in the Cayman Islands would, under the clear definition in the pleadings there, amount to the very same $319 million, which has been awarded to KBC in the United States.

It is now necessary to deal with the argument of Pertamina that this Court should not be concerned about any effect on the American judicial process because the judgments have been entered, KBC has been paid, and that is the end of the matter as far as the jurisdiction and interest of the federal courts in the United States are concerned. This Court disagrees. To explain this disagreement, certain obvious propositions must be stated. A federal court in Texas has determined that KBC is entitled to be paid the amount of the Arbitral Award plus interest. This means that, as far as the litigation between KBC and Pertamina regarding the Arbitral Award is concerned, KBC is entitled to receive the money, to

own the money, and to dispose of that money as it sees fit. The litigation in the Southern District of New York determined that certain funds of Pertamina, located in New York banks, can be used to pay the judgment debt to KBC. Again, the premise of the proceedings in New York has been that, as far as the issues between KBC and Pertamina about the Arbitral Award are concerned, KBC is entitled to have the funds turned over to it, is entitled to own those funds, and is entitled to dispose of those funds as it sees fit. The judgments referred to above are not conditional, or qualified, or limited in any way as to KBC's rights with respect to the monies awarded.

On the other hand, it is obvious that when a judgment creditor receives money awarded by a judgment, there may be many reasons why that money might be attached or might be subject to some lien or some question of title. A judgment creditor might be subject to other lawsuits or other claims of various kinds, independent of the lawsuit in which the judgment was entered.

But, if the judgment debtor is seeking to tie up the proceeds of the judgment in an action to vacate or overturn the judgment, as this Court has found that Pertamina is attempting to do, then there are definite rules about when, and under what conditions, this can be done. And courts are surely not hospitable to subterfuge designed to avoid applicable rules. For instance, if a judgment debtor files something called an action for damages against the judgment creditor, and seeks damages in the precise amount of the judgment, our courts would undoubtedly not allow this strategy as a means for

evading the rules relating to proper grounds for setting aside judgments. The Cayman Islands action brought by Pertamina is exactly the kind of action just spoken of.

This Court does not accept the proposition that, under these circumstances, it has no legitimate interest in the matter and no power to protect KBC from abusive litigation, even in a foreign court. This Court believes that Pertamina's attempt to use the injunctive powers of the Cayman Islands court would, if successful, truly interfere with the jurisdiction of the federal courts in the United States. Such jurisdiction surely embraces the sanctity and finality of judgments and the rights obtained under those judgments. For reasons already indicated, it is no answer to this to say that the only thing sought is a remedy against KBC's disposition of the funds, rather than a remedy against some ongoing court process. If KBC cannot have full ownership rights to the money, including the right to pay it to the owners of KBC, then all of the process leading up to the award of the money to KBC has been in vain.

This Court has the power, and indeed the duty, to deal with abusive litigation tactics used by a party before it. In the present case the salient fact is that, after almost six years of litigation in district and appellate courts based on the Arbitral Award, the American courts had finally resolved all the issues presented to them about whether the Arbitral Award should be confirmed and about the method by which KBC should recover the large amount due.

Although procedures were available under

federal law for Pertamina to make its claim of fraud and to seek to prevent KBC from recovering the $319 million, there was no attempt whatever by Pertamina to make use of such procedures. Instead, Pertamina engaged in the six years of litigation in the United States without any mention of its claim of fraud. Finally, at the very moment when the litigation was to be legitimately ended, Pertamina brought the action in the Cayman Islands after engaging in literal subterfuge in dealing with the Court in New York. The purpose of this lawsuit is to effectively wipe out the effect of the United States judgments and to do this with as great an amount of delay as possible.

Conclusion

Under all the circumstances, the Court grants KBC's motion in the following manner. At the very least, KBC is entitled to an injunction prohibiting Pertamina from applying to the Cayman Islands court or any other court for any order restricting KBC in the use or disposition of funds awarded to it pursuant to the judgments. Beyond this, the Court believes that the record justifies an injunction entirely prohibiting Pertamina from pursuing the Cayman Islands action or any similar action in any court, because KBC is entitled to be protected against litigation designed to delay the completion of this lengthy court contest.

In its notice of motion, KBC requests that the Court grant "such other and further relief as the Court deems just and proper." The Court deems it just and proper to accompany the injunction with a

declaratory judgment. The nature of the declaratory judgment follows inevitably from what has been decided in this opinion. Therefore the Court will issue a declaratory judgment declaring that the funds recovered by KBC pursuant to the judgments in this matter are the property of KBC, that KBC has full right to dispose of such funds as KBC sees fit, and that, in the event that Pertamina should for some reason obtain an order of the Cayman Islands court or any other court, based upon matters relating to the Arbitral Award, purporting to interfere with KBC's rights to dispose of the funds, KBC has no obligation to comply with such order.

The parties will settle an Order and Judgment based on this opinion. When that Order and Judgment is signed by the Court, the Order of September 27, 2006, will be deemed vacated, as will the Memorandum of September 27, 2006 restricting KBC's ability to distribute funds. However, in connection with the settlement of the Order and Judgment based on this opinion, the Court will entertain an application for a stay pending appeal if any party wishes to make such an application.

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KARAHA BODAS CO., L.L.C.,
Plaintiff-Appellee,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA; ET AL., *Defendants,*

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Defendant-Appellant.

Nos. 02-20042, 03-20602

March 23, 2004

William A. Isaacson (argued), Jonathan D. Schiller, Carl John Nichols, Philip Michael Spector, Alison E. Peck, Boies, Schiller & Flexner, Christopher F. Dugan, Paul, Hastings, Janofsky & Walker, Washington, DC, Kenneth Stuart Marks, Susman Godfrey, Emil T. Bayko, Jones Day, Houston, TX, for Plaintiff-Appellee.

Matthew D. Slater (argued), Cleary, Gottlieb, Steen & Hamilton, Washington, DC, F. Walter Conrad, Jr., Michael L. Brem, Baker Botts, Houston, TX, for

Defendant-Appellant.

Carolyn B. Lamm, White & Case, Washington, DC, John E. O'Neill, Jesse R. Pierce, Clements, O'Neill, Pierce, Wilson & Fulkerson, Houston, TX, for Republic of Indonesia, Amicus Curiae.

Appeal from the United States District Court for the Southern District of Texas.

Before KING, Chief Judge, DAVIS, Circuit Judge, and ROSENTHAL*, District Judge.

ROSENTHAL, District Judge:

Thirty years ago, the United States Supreme Court recognized that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.... Such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved."[1] When, as here, parties to international commercial contracts agree to arbitrate future disputes in a neutral forum, orderliness and predictability also depend on the procedures for reviewing and enforcing arbitral

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* District Judge of the Southern District of Texas, sitting by designation.

1 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).

awards that may result. This appeal arises from an arbitral award (the "Award") made in Geneva, Switzerland, involving contracts negotiated and allegedly breached in Indonesia. The Award imposed liability and damages against Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"), which is owned by the government of Indonesia, in favor of Karaha Bodas Company, L.L.C. ("KBC"), a Cayman Islands company. KBC filed this suit in the federal district court in Texas to enforce the Award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and filed enforcement actions in Hong Kong and Canada as well.[2] While those enforcement proceedings were pending, Pertamina appealed the Award in the Swiss courts, seeking annulment. When that effort failed, and after the Texas district court granted summary judgment enforcing the Award, Pertamina obtained an order from an Indonesian court annulling the Award.[3]

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[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force with respect to the United States, Dec. 29, 1970), *codified at* 9 U.S.C. § 201 *et seq.*

[3] A different panel of this court heard a separate appeal from the district court's injunction against Pertamina's prosecution of the action in Indonesia, but did not decide the effect of the Indonesian court's annulment order on the enforcement proceeding. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 335 F.3d 357, 373-74 (5th Cir.2003). One of the issues before this panel is whether the Indonesian court's order is a defense to the enforcement of the Award.

Pertamina appealed to this court. During the appeal, Pertamina filed in the district court a motion to set aside the judgment under Federal Rule of Civil Procedure 60(b)(2), based on newly-discovered evidence Pertamina contended should have been disclosed during the arbitration, and under Rule 60(b)(5), based on the Indonesian court's decision annulling the arbitration Award. This court remanded to the district court for consideration of Pertamina's Rule 60(b) motion.[4] On remand, the district court denied Pertamina's Rule 60(b) motion. This appeal consolidates Pertamina's challenges to the grant of summary judgment and to the denial of the Rule 60(b) motion.

Pertamina urges this court to reverse the district court's decision enforcing the Award on several grounds under the New York Convention. We conclude that the record forecloses Pertamina's arguments that procedural violations and other errors occurred during the arbitration preclude enforcement. We reject Pertamina's argument that the Indonesian court's order annulling the Award bars its enforcement under the New York Convention; this argument is inconsistent with the arbitration agreements Pertamina signed and with its earlier position that Switzerland, the neutral forum the parties selected, had exclusive jurisdiction over an annulment proceeding. We reject Pertamina's efforts to delay or avoid enforcement of the Award as evidencing a disregard for the

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[4] *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2003 WL 21027134, at *4-6 (5th Cir. March 5, 2003).

international commercial arbitration procedures it agreed to follow.[5] In short, we affirm the district court's judgment enforcing the Award, for the reasons set out in detail below.

I. Background

A. Procedural and Factual History

KBC explores and develops geothermal energy sources and builds electric generating stations using geothermal sources. Pertamina is an oil, gas, and geothermal energy company owned by the Republic of Indonesia.[6] In November 1994, KBC signed two contracts to produce electricity from geothermal sources in Indonesia. Under the Joint Operation Contract ("JOC"), KBC had the right to develop geothermal energy sources in the Karaha area of Indonesia; Pertamina was to manage the project and receive the electricity generated. Under the Energy Sales Contract ("ESC"), PLN agreed to purchase from Pertamina the energy generated by KBC's facilities. Both contracts contained almost identical broad arbitration clauses, requiring the parties to arbitrate any disputes in Geneva, Switzerland under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL").[7]

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[5] We note that the length of this opinion reflects the number of arguments Pertamina raises to evade its obligations under the Award more than the strength of those arguments.

[6] PLN, an electric utility owned by the government of Indonesia, was a party to the arbitration but was dismissed from the district court action.

[7] Article 13.2(a) of the arbitration provision of the JOC provided:

> If the Dispute cannot be settled within thirty (30) working days by mutual discussions as contemplated by Article 13.1 hereof, the Dispute shall finally be settled by an arbitral tribunal (the "Tribunal") under the UNCITRAL arbitration rules.... Each Party will appoint an arbitrator within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes. Both Parties undertake to implement the arbitration award. The site of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English. The Parties expressly agree to waive [certain Indonesian procedural laws]....

JOC, Art. 13.2(a),(d). Section 8.2(a) of the ESC's arbitration provision similarly read:

> If the Dispute cannot be settled within forty-five calendar (45) days by mutual discussions as contemplated by Section 8.1 hereof, the Dispute shall finally be settled by an arbitral tribunal (the "Tribunal") under the UNCITRAL arbitration rules.... PLN on one hand, and [KBC] and PERTAMINA on the other hand, will each appoint one arbitrator, in each case within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes, upon the request of any Party. All Parties undertake to implement the arbitration award. The site of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English. The Parties expressly agree to waive the applicability of [certain

On September 20, 1997, the government of Indonesia temporarily suspended the project because of the country's financial crisis. The government of Indonesia indefinitely suspended the project on January 10, 1998. On February 10, 1998, KBC notified Pertamina and PLN that the government's indefinite suspension constituted an event of "force majeure" under the contracts. KBC initiated arbitration proceedings on April 30, 1998. In its notice of arbitration, KBC appointed Professor Piero Bernardini, vice-chair of the International Chamber of Commerce's ("ICC") International Court of Arbitration and member of the London Court of International Arbitration, to serve as an arbitrator.

Indonesian procedural laws]....

Both contracts contained the following additional arbitration language:

> The award rendered in any arbitration commenced hereunder shall be final and binding upon the Parties and judgment thereon may be entered in any court having jurisdiction for its enforcement. The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure [neither] Party shall appeal to any court from the decision of the arbitral panel and accordingly the Parties hereby waive the applicability of [certain Indonesian laws]. In addition, the Parties agree that [neither] Party shall have any right to commence or maintain any suit or legal proceeding concerning a [dispute hereunder until the] dispute has been determined in accordance with the arbitration procedure provided for herein and then only to enforce or facilitate the execution of the award rendered in such arbitration.

JOC, Art. 13.2(d); ESC, § 8.2(d).

Pertamina, however, did not designate an arbitrator in the contractually allotted thirty days. The JOC and ESC both provided that if a party failed to appoint an arbitrator within thirty days, the Secretary-General of the International Center for Settlement of Investment Disputes ("ICSID") was to make the appointment. After notifying Pertamina, PLN, and the government of Indonesia, the ICSID appointed Dr. Ahmed El-Kosheri, another vice-chair of the ICC, as the second arbitrator. As specified in the JOC and ESC, the two appointed arbitrators then selected the chairman of the arbitration panel, Yves Derains, the former Secretary-General of the ICC.

Pertamina raised threshold challenges to the Tribunal's consolidation of the claims KBC raised under the JOC and the ESC into one arbitration proceeding and to the selection of the panel. In October 1999, the Tribunal issued a Preliminary Award, rejecting Pertamina's threshold challenges and ruling that the government of Indonesia was not a party to the contracts or to the arbitration proceeding.

KBC filed its Revised Statement of Claim in November 1999. Pertamina received a number of extensions before it filed its reply to the Revised Statement of Claim in April 2000. KBC filed a rebuttal to that reply in May 2000. In response to KBC's rebuttal, Pertamina sought additional discovery and a continuance of the proceedings, claiming that KBC had raised assertions and added elements to its case-in-chief not contained in the Revised Statement of Claim.

From the outset, the parties vigorously disputed whether KBC could have obtained financing to build the project if the government of Indonesia had not issued the suspension decree. Pertamina contended that KBC could not have built the project-and therefore suffered no damages from the government decree suspending the work-because the precarious situation in Indonesia effectively made the necessary financing unavailable. Pertamina asserted that KBC's rebuttal introduced a new theory as to how project financing could have been obtained. KBC changed from focusing on the availability of third-party financing and argued in the rebuttal that one of its direct investors, FPL Energy ("FPL"), would have provided project financing if no other source was available. Shortly before the scheduled hearing, Pertamina sought discovery of documents relating to FPL's asserted willingness to finance the project. In May 2000, the Tribunal denied Pertamina's request to obtain this discovery before the hearing and denied the request for a continuance. The Tribunal stated that it would decide at the conclusion of the hearing "whether any adjustment to the proceeding" would be required because of the discovery requested. The hearing on the merits proceeded as scheduled in June 2000.

The Tribunal received a large record. Both sides submitted extensive witness statements, expert reports, exhibits, and briefs. During the hearing, Pertamina and PLN cross-examined KBC's witnesses, including two witnesses who testified about KBC's ability to finance the project, Robert McGrath, Treasurer of FPL Group, Inc., and Leslie

Gelber, former Vice-President of Development at FPL Energy. Both witnesses submitted declarations stating that "FPL Energy was prepared in 1998 to provide bridge financing or direct capital to continue the Project through the phases of the Project that were scheduled to be completed during Indonesia's period of instability." At the hearing, counsel for Pertamina specifically questioned McGrath about the availability of project financing from FPL. During that questioning, a Tribunal member asked McGrath whether the investment in the project was protected by a form of political risk insurance. McGrath responded, "I am not sure of that. I know there were some discussions at the time, but I don't recollect as to whether it was or wasn't." Counsel for Pertamina asked no follow-up questions. At the end of the hearing, counsel for Pertamina declined to pursue the previously requested discovery and stated that the record had been "fully" made.

In the Final Award, the Tribunal found that under the JOC and the ESC, Pertamina and PLN had accepted the risk of loss arising from a "Government Related Event." The Tribunal interpreted the contracts as "putting the consequences of a Governmental decision which prevents the performance of the contract at Pertamina's ... sole risk." The Tribunal awarded KBC $111.1 million, the amount KBC had expended on the project, and $150 million in lost profits. The Tribunal explained in detail why it rejected the lost profits amount KBC sought-$512.5 million-and how it arrived at the amount awarded.

In February 2001, Pertamina appealed the Award

to the Supreme Court of Switzerland. While that appeal was pending, KBC initiated this suit in the federal district court to enforce the Award.

B. The District Court Decisions

Pertamina challenged enforcement of the Award in the federal district court on four grounds under Article V of the New York Convention: (1) the procedure for selecting the arbitrators was not in accordance with the agreement of the parties; (2) the Tribunal improperly consolidated the claims into one arbitration; (3) Pertamina was "unable to present its case" to the Tribunal; and (4) enforcement of the damages Award would violate the public policy of the United States. As to the first two grounds, Pertamina contended that the decision to consolidate the claims under the two contracts was procedurally improper and that KBC's unilateral appointment of an arbitrator violated the ESC arbitration provision. As to the third ground, Pertamina argued that the Tribunal improperly reversed its finding in the Preliminary Award that Pertamina did not breach the contracts by holding Pertamina liable for nonperformance in the Final Award; that the Tribunal's denial of Pertamina's request for discovery of FPL's records prevented Pertamina from fully presenting its case; and that the Tribunal's denial of a continuance after KBC filed its rebuttal to the reply to the Revised Statement of Claim prevented Pertamina from fully preparing to meet KBC's contentions. As to the fourth ground, Pertamina argued that the Award violated the international abuse of rights doctrine and punished Pertamina for obeying the Indonesian government's decree. Under

Federal Rule of Civil Procedure 56(f), Pertamina requested a delay in the district court in responding to KBC's summary judgment motion to seek discovery of the same FPL records it had unsuccessfully sought in the arbitration.

Pertamina continued its appeal seeking annulment of the Award to the Supreme Court of Switzerland while the enforcement action was pending in the district court in Texas. The Texas district court slowed the proceedings in deference to Pertamina's request that the Swiss court first be allowed to decide whether to annul the Award. In April 2001, the Swiss Supreme Court dismissed Pertamina's claim because of untimely payment of costs. Pertamina moved for reconsideration; the Swiss court denied that motion in August 2001.

In December 2001, the district court enforced the Award, rejecting each of Pertamina's grounds for refusal. The district court carefully reviewed the record in examining Pertamina's claimed inability to challenge in the arbitration proceeding KBC's argument that it could have obtained project financing from its investor, FPL. The district court denied Pertamina's Rule 56(f) request for additional discovery on this issue. Pertamina filed its notice of appeal from the district court's summary judgment enforcing the Award in January 2002.

Having failed in its effort to annul the Award in the Swiss courts, Pertamina filed suit in Indonesia seeking annulment. In August 2002, an Indonesian court annulled the Award. KBC continued with enforcement suits in Hong Kong and Canada. In

October 2002, while this appeal was pending, Pertamina discovered in the Canadian proceeding that FPL and one other KBC investor, Caithness, had held a political risk insurance policy covering the KBC project through Lloyd's of London. Pertamina also learned that Lloyd's had paid $75 million under that insurance policy to FPL and Caithness for the losses resulting from the Indonesian government's suspension of the project.

In December 2002, Pertamina filed a motion in the district court to vacate the judgment on three grounds: (1) newly-discovered evidence of the political risk insurance policy, under Rule 60(b)(2); (2) the Indonesian court's annulment of the underlying arbitral Award, under Rule 60(b)(5); and (3) satisfaction of judgment to the extent of the $75 million insurance payment. Pertamina also filed a motion in this court to supplement the record and briefing. In both motions, Pertamina argued that the existence of political risk insurance coverage in favor of FPL undermined KBC's claims that the contracts allocated political risks to Pertamina and that FPL would have financed the project in order to avoid losing its earlier investment. Additionally, Pertamina argued that the payment of the insurance proceeds undermined the Tribunal's determination of damages. Pertamina urged that KBC's failure to disclose the insurance during the arbitration provided a basis for refusing to enforce the Award and made the district court's summary judgment improper.

This court denied Pertamina's motion to supplement the appellate record under Federal Rule

of Appellate Procedure 10(c) and remanded to the district court for consideration of Pertamina's Rule 60(b) motion. On remand, the district court denied the motion, finding that Pertamina failed to show that KBC had misled the tribunal or that KBC's failure to produce the political risk insurance policy violated the rules governing the arbitration.

The district court also rejected Pertamina's claim that Indonesia had primary jurisdiction to decide to annul the Award and declined to give effect to the Indonesian court's annulment order as a defense to enforcement. The district court imposed judicial estoppel to preclude Pertamina from asserting that Indonesian procedural law had governed the arbitration and that Indonesian courts had primary jurisdiction to review the Award. Finally, the district court rejected Pertamina's argument that the amount of the Award should be offset by the $75 million insurance payment.[8]

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[8] The day after the district court issued its final order denying Pertamina's Rule 60(b) motion, KBC submitted a letter to the court "clarifying" that while FPL was not the insured under the political risk insurance policy, FPL owned one of the named insureds that benefitted under the policy. The district court issued a supplemental order acknowledging KBC's letter and noting that the fact that FPL was not a named insured under the insurance policy "was only one of many factors that the Court considered in denying Pertamina's Rule 60(b) Motion. Thus, the fact that an entity owned by FPL, but not FPL itself, benefit[t]ed under the policy does not change any legal conclusion" in the court's decision. On the same day that the district court issued its supplemental order, and ten days after the court's denial of Pertamina's Rule 60(b) motion, KBC filed a Motion to Amend Findings of Fact under Federal Rule of Civil Procedure 52(b). In a second supplemental order, the district court recognized KBC's motion as a Motion to Amend or Alter

This appeal followed. Pertamina argues that the Tribunal improperly consolidated the claims into one arbitration proceeding; the selection of the arbitrators violated the JOC and ESC; the Tribunal denied Pertamina a fair opportunity to present its case because the Tribunal reversed part of its Preliminary Award without notice, denied Pertamina's request to postpone the arbitration, and denied Pertamina's discovery requests; the Award is contrary to public policy because it violated the international law abuse of rights doctrine and because the district court's decision holds Pertamina liable for complying with Indonesian law; and the Indonesian court's annulment of the arbitral Award is a defense to enforcement under the New York Convention. Each ground is addressed below.

II. Analysis

A district court's decision confirming an arbitration award is reviewed under the same standard as any other district court decision.[9] This court reviews a district court's grant of summary

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Judgment under Federal Rule of Civil Procedure 59(e) and granted the motion. The court assumed, without deciding, that FPL benefitted from the risk insurance policy, but held that it did not affect the basis of the court's decision. Pertamina argues that the district court did not have jurisdiction to issue either of these two supplemental orders. This court agrees that the issue addressed in the supplemental orders does not affect the outcome of this case.

[9] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-948, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 592 (5th Cir.2001).

judgment *de novo.*[10]

A. The New York Convention

The New York Convention provides a carefully structured framework for the review and enforcement of international arbitral awards. Only a court in a country with primary jurisdiction over an arbitral award may annul that award.[11] Courts in other countries have secondary jurisdiction; a court in a country with secondary jurisdiction is limited to deciding whether the award may be enforced in that country.[12] The Convention "mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought."[13] Under the Convention, "the country in which, or under the [arbitration] law of which, [an] award was made" is said to have primary jurisdiction over the arbitration award.[14] All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award.[15] It is clear that the district court had secondary jurisdiction and considered only whether

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10 *Eason v. Thaler,* 73 F.3d 1322, 1324 (5th Cir.1996).

11 *Karaha Bodas Co.,* 335 F.3d at 364;*see Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.,* 126 F.3d 15, 23 (2d Cir.1997).

12 *Karaha Bodas Co.,* 335 F.3d at 364.

13 *Alghanim,* 126 F.3d at 23 (quoted in *Karaha Bodas Co.,* 335 F.3d at 364).

14 *Karaha Bodas Co.,* 335 F.3d at 364.

15 *Id.*

to enforce the Award in the United States.

Article V enumerates specific grounds on which a court with secondary jurisdiction may refuse enforcement.[16] In contrast to the limited authority of

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[16] Article V, Section 201 of the New York Convention provides:

> *1.* Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> *(a)* The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> *(b)* The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> *(c)* The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> *(d)* The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> *(e)* The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under

secondary-jurisdiction courts to review an arbitral award, courts of primary jurisdiction, usually the courts of the country of the arbitral situs, have much broader discretion to set aside an award. While courts of a primary jurisdiction country may apply their own domestic law in evaluating a request to annul or set aside an arbitral award, courts in countries of secondary jurisdiction may refuse enforcement only on the grounds specified in Article V.[17]

The New York Convention and the implementing legislation, Chapter 2 of the Federal Arbitration Act ("FAA"), provide that a secondary jurisdiction court must enforce an arbitration award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in the Convention.[18] The court may not refuse to enforce an arbitral award solely on

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> the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
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> *(a)* The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> *(b)* The recognition or enforcement of the award would be contrary to the public policy of that country.

9 U.S.C. § 201, Art. V(1)-(2). *See generally Alghanim*, 126 F.3d at 23; Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. Int'l L. & Pol. 175 (1996).

[17] *Alghanim*, 126 F.3d at 23 (cited in *Karaha Bodas Co.*, 335 F.3d at 368).

[18] 9 U.S.C. § 207.

the ground that the arbitrator may have made a mistake of law or fact.[19] "Absent extraordinary circumstances, a confirming court is not to reconsider an arbitrator's findings."[20] The party defending against enforcement of the arbitral award bears the burden of proof.[21] Defenses to enforcement under the New York Convention are construed narrowly, "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts...."[22]

B. The Choice-of-Law Issues

In the JOC and ESC, the parties stipulated that "the site of the arbitration shall be Geneva." The Tribunal concluded that under the arbitration agreements, Swiss procedural law applied as the law of the arbitral forum.[23] From 1998 to April 2002,

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[19] *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir.1998); *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters*, 990 F.2d 957, 960 (7th Cir.1993).

[20] *Europcar Italia*, 156 F.3d at 315.

[21] *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir.1976); *see Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 n. 3 (11th Cir.2004).

[22] *Imperial Ethiopian Gov't*, 535 F.2d at 335; *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 974, 976 (2d Cir.1974).

[23] The Tribunal specifically cited Swiss procedural law in its Preliminary Award. The Tribunal first cited Swiss law regarding the intentions of parties to a contract to help guide its determination whether the government of Indonesia was a party to the JOC and ESC. The Tribunal cited the Swiss concept of "connexity" in concluding that KBC could consolidate its claims under the contracts into a single arbitration proceeding. Finally, the Tribunal referred to Swiss common law

Pertamina consistently and repeatedly took the position before the Tribunal, the Swiss courts, and the United States district court, that Swiss procedural law applied to the arbitration.[24] In April

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suggesting that arbitrators are not agents in determining that the selection of Tribunal arbitrators was appropriate under the agreements. The Final Award stated that it was "[m]ade in Geneva."

[24] *See, e.g.*, Prelim. Award, § B(1) ("The Respondents support this conclusion by making reference to Swiss law as the JOC and the ESC provide for UNCITRAL Arbitration in Geneva between the parties which are neither Swiss nor Swiss resident. As a result, and under both contracts, the arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes. Under Swiss law, [Respondent contends] the Arbitral Tribunal is lacking jurisdiction because KBC failed to comply with the contractual prerequisites to arbitration."); *id.* at § C(1) ("The Respondents also state that, under the arbitration agreements and Swiss law, the arbitrators have no power to consolidate ...."); *id.* at § C(3) (citing a Swiss federal tribunal case in support of its decision that a consolidated arbitration was appropriate); *id.* at § D(1) (Respondents contend that "[s]uch solution is not acceptable under the applicable Swiss law").

The district court found that Pertamina "specifically, repeatedly and unequivocally" argued that Swiss arbitration law applied in the arbitration. Pertamina opened its motion to stay the district court proceedings pending appeal to the Swiss judiciary by stating: "The arbitration award ... was conducted subject to the arbitration laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland.... KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration." Pertamina added that "it is fundamental that the courts of the originating nation are in the best position to pass on issues under their own law.... Here, Pertamina's appeal encompasses questions of Swiss law." Pertamina made similar arguments under Swiss procedural law in its responses to KBC's motion for summary judgment.

2002, after the Swiss court had rejected Pertamina's annulment proceeding and the district court had held the Award enforceable in the United States, Pertamina moved in the district court for a stay of the Award pending the outcome of the annulment proceeding Pertamina had filed in Indonesia. For the first time, Pertamina raised in the district court the argument that Indonesian, not Swiss, procedural law had applied to the arbitration. Pertamina took this position in the district court as part of its argument that Indonesia had primary jurisdiction over the Award and therefore had the authority to set it aside rather than merely decline to enforce it.

Article V(1)(e) of the Convention provides that a court of secondary jurisdiction may refuse to enforce an arbitral award if it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[25] Courts have held that the language, " 'the competent authority of the country ... under the law of which, that award was made' refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law ... applied in the case."[26] In this appeal, Pertamina and the Republic of Indonesia (the "Republic"), as amicus, argue that the Tribunal and the district court erred

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[25] 9 U.S.C. § 201, Art. V(1)(e).

[26] *Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. Y Comercial,* 745 F.Supp. 172, 178 (S.D.N.Y.1990); *see Alghanim,* 126 F.3d at 21; *M & C Corp. v. Erwin Behr GmbH & Co., KG,* 87 F.3d 844, 848 (6th Cir.1996).

in finding that Swiss procedural law, rather than Indonesian procedural law, applied. Pertamina and the Republic argue that in the arbitration agreements, the parties chose Indonesian procedural, as well as substantive, law to govern the arbitration. Pertamina and the Republic assert that, as a result: (1) the arbitration must be examined for compliance with Indonesian procedural law; and (2) the Indonesian court had primary jurisdiction to annul the Award, providing a defense to enforcement in the United States. KBC responds that the Tribunal properly interpreted the parties' contracts in deciding that Swiss procedural law applied and the district court properly applied the New York Convention in affirming that decision. This court agrees with KBC.

Under the New York Convention, the rulings of the Tribunal interpreting the parties' contract are entitled to deference.[27] Unless the Tribunal manifestly disregarded the parties' agreement or the law, there is no basis to set aside the determination that Swiss procedural law applied.[28] The parties' arbitration agreements specified that the site of the arbitration was Geneva, Switzerland and that the arbitration would proceed under the UNCITRAL rules. Those rules specify that the "arbitral tribunal shall apply the law designated by the parties as

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[27] *Europcar Italia*, 156 F.3d at 315; *Nat'l Wrecking Co.*, 990 F.2d at 960; *see James Ford Inc. v. Ford Dealer Computer Serv. Inc.*, 56 Fed. Appx. 324, 325 (9th Cir.2003) (giving broad deference to an arbitrator's choice-of-law decision).

[28] *Europcar Italia*, 156 F.3d at 315; *Nat'l Wrecking Co.*, 990 F.2d at 960.

applicable to the substance of the dispute."[29] It is undisputed that the parties specified that Indonesian substantive law would apply.[30] It is also undisputed that the contracts specified the site of the arbitration as Switzerland. The contracts did not otherwise expressly identify the procedural law that would apply to the arbitration. The parties did refer to certain Indonesian Civil Procedure Rules in the contracts.[31] Pertamina and the Republic argue that

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[29] *UNCITRAL Arbitration Rules*, G.A. Res. 31/98, U.N. GAOR Comm'n Int'l Trade L., at Art. 33(1) (1976), http://www.uncitral.org/english/texts/arbitration/arb-rules.html.

[30] Article 20 of the JOC and Section 12.1 of the ESC each provided: "This Contract shall be governed by the laws and regulations of [the] Republic of Indonesia."

[31] Pertamina and the Republic rely on the following contractual provisions for their position:

> The parties expressly agree to waive the applicability of (a) Article 650.2 of the Indonesian Code of Civil Procedure so that the appointment of the arbitrators shall not terminate as of the sixth (6th) Month after the date(s) of their appointments and (b) the second sentence of Article 620.1 of the Indonesian Code of Civil Procedure so that the arbitration need not be completed within the specific time.

JOC at Art. 13.2(a); ESC at § 8.2(a).

> In accordance with Section 631 of the Indonesian Code of Civil Procedure, the Parties agree that the Tribunal need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Contract and the underlying intent of the Parties, and as to such matters their conclusion shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this Contract in accordance with such terms.

JOC at Art. 13.2(b); ESC at § 8.2(b).

these references evidence an intent that while Switzerland would be the place of the arbitration, Indonesian procedural law would apply as the *lex arbitri*.

Under the New York Convention, an agreement specifying the place of the arbitration creates a presumption that the procedural law of that place applies to the arbitration.[32] Authorities on international arbitration describe an agreement providing that one country will be the site of the arbitration but the proceedings will be held under

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> The parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure neither Party shall appeal to any court ... and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of the Law No. 1 of 1950 and any other provision of Indonesian law and regulations that would otherwise give the right to appeal the decisions of the arbitral panel.

JOC at Art. 13.2(d); ESC at § 8.2(d).

[32] Albert Jan van den Berg, "The Application of the New York Convention by the Courts," *ICCA Congress Series No. 9* 25, 26 (Kluwer 1999); Sir Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* 64 (Butterworths 2d ed.1989); Alain Hirsch, *The Place of the Arbitration and the* Lex Arbitri, 34 Arb. J. 43, 46 (1979); Alan Scott Rau, *The New York Convention in American Courts,* 7 Am. Rev. Int'l Arb. 213, 224 (1996). In their reports filed in the district court, recognized authorities on international arbitration retained by both Pertamina and KBC, including Albert Jan van den Berg, Sudargo Guatama, Alan Scott Rau, and Eric A. Schwartz, agreed that under the Convention, arbitration clauses designating the site of the arbitration presumptively designate that site as the source of the applicable procedural law.

the arbitration law of another country by terms such as "exceptional"; "almost unknown";[33] a "purely academic invention";[34] "almost never used in practice";[35] a possibility "more theoretical than real"; and a "once-in-a-blue-moon set of circumstances."[36] Commentators note that such an agreement would be complex, inconvenient, and inconsistent with the selection of a neutral forum as the arbitral forum.[37]

In the JOC and ESC, the parties expressly agreed that Switzerland would be the site for the arbitration. This agreement presumptively selected Swiss procedural law to apply to the arbitration. There is no express agreement in the JOC or ESC that Indonesia would be the country "under the law of which" the arbitration was to be conducted and the

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[33] Mustill and Boyd, *Commercial Arbitration* at 64.

[34] Van den Berg, The Application of the New York Convention at 26.

[35] *Id.*

[36] Martin Hunter, *Case and Comment: International Arbitration,* [1988] Lloyd's Mar. & Comm. L.Q. 23, 26.

[37] *See, e.g.,* Gary B. Born, *International Commercial Arbitration: Commentary and Materials* 761 (2d ed.2001). Few reported cases involve arbitration clauses that separate the law of the forum state and the *lex arbitri.* In two such English cases, *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru,* [1988] 1 Lloyd's L. Rep. 116 (C.A.1987), and *Union of India v. McDonnell Douglas Corp.,* [1993] 2 Lloyd's Rep. 48 (Q.B.1992), the courts applied the presumption that the procedural law of the place specified as the forum for the arbitration would govern. *Naviera Amazonica Peruana,* [1988] 1 Lloyd's L. Rep. at 119; *Union of India,* [1993] 2 Lloyd's Rep. at 50. The Hong Kong court also relied upon this presumption in determining that Swiss procedural law governed the arbitration proceeding at issue in this case. *Hong Kong decision* at 7-8.

Award was to be made.[38] The Tribunal recognized the parties' selection of Switzerland by issuing the Award as "[m]ade in Geneva." In selecting Switzerland as the site of the arbitration, the parties were not choosing a physical place for the arbitration to occur, but rather the place where the award would be "made." Under Article 16(1) of the UNCITRAL rules, the "place" designated for an arbitration is the legal rather than physical location of the forum.[39] The arbitration proceeding in this case physically occurred in Paris, but the Award was "made in" Geneva, the place of the arbitration in the legal sense and the presumptive source of the applicable procedural law.[40]

The references in the contracts to certain Indonesian civil procedure rules do not rebut the strong presumption that Swiss procedural law applied to the arbitration.[41] These references fall far

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[38] 9 U.S.C. § 201, Art. V(1)(e).

[39] See Jacomijn J. van Hof, Commentary on the UNCITRAL Arbitral Rules: The Application by the Iran-U.S. Claims Tribunal 109-10 (Kluwer 1991); see also UNCITRAL Arbitration Rules at Art. 16(1). Rules 16(2) and (3) expressly permit proceedings to be conducted at a location different from the designated "place" of the arbitration. UNCITRAL Arbitration Rules at Art. 16(2)-(3). Rule 16(4) provides that "[t]he award shall be made at the place of arbitration." Id. at Art. 16(4).

[40] Van Hof, *Commentary on the UNCITRAL Arbitral Rules* at 109-110.

[41] Robert N. Hornick, one of the authorities on international arbitration and Indonesian law who submitted an affidavit and report in the district court, provided an explanation for the references to the Indonesian laws in the arbitration clauses unrelated to any intent to designate Indonesia as the country

short of an express designation of Indonesian procedural law necessary to rebut the strong presumption that designating the place of the arbitration also designates the law under which the award is made.

Pertamina and the Republic have belatedly asserted that the district court should have conducted a choice-of-law analysis to determine the law that would apply to the interpretation of the parties' contracts, rather than analyze the contracts under the New York Convention. Pertamina and the Republic assert that the result of such an analysis would have been to identify Indonesian law as the decisional law under which to interpret the contracts. This argument is inconsistent with the position Pertamina-and its experts on interpreting international commercial arbitration agreements-took earlier in this case, that the district court should review the Tribunal's interpretation of the contracts under the New York Convention. A court conducts the multifactor choice-of-law analysis Pertamina now advocates in the absence of an effective choice of law by the parties to an arbitration agreement.[42] In the JOC and ESC, the parties presumptively chose Swiss

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under the law of which the Award would be made. Hornick explained that each article of Indonesian law cited in the contracts imposes a requirement inconsistent with the contemplated arbitration. (Hornick Decl. ¶¶ 28-32) These articles could have been invoked to oppose later enforcement of the Award in Indonesia unless waived. By waiving in advance provisions that could later be invoked to block enforcement of the Award in an Indonesian court, the parties facilitated future enforcement efforts in Indonesia. (*Id.*).

[42] REST. (2D) CONFL. §§ 187, 188, & 218 (1971).

procedural law as the *lex arbitri* when they designated Switzerland as the site of the arbitration, and that presumption is unrebutted.[43]

As the district court, another panel of this court, and the Hong Kong Court of First Instance have all recognized, Pertamina's previous arguments that Swiss arbitral law applied strongly evidence the parties' contractual intent.[44] Pertamina represented to the Tribunal that Swiss procedural law applied.[45]

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[43] Certain sections and comments of the *Restatement* also support a determination that Swiss law applied to the arbitration agreement. *See, e.g. id.* at § 188 (incorporating REST. § 6, which requires consideration of the relevant policies of the forum); *id.* at § 218 cmt. b (suggesting that the arbitration forum may have the most significant relationship to the arbitration and that a contractual provision requiring arbitration to occur in a certain forum may evidence an intention by the parties that the local law of this forum should govern).

[44] *Karaha Bodas Co.*, 335 F.3d at 371; *Hong Kong decision* at 12.

[45] *See, e.g.*, Prelim. Award, § B(1) ("The Respondents support this conclusion by making reference to Swiss law as the JOC and the ESC provide for UNCITRAL Arbitration in Geneva between the parties which are neither Swiss nor Swiss resident. As a result, and under both contracts, the arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes. Under Swiss law, [Respondent contends] the Arbitral Tribunal is lacking jurisdiction because KBC failed to comply with the contractual prerequisites to arbitration."); *id.* at § C(1) ("The Respondents also state that, under the arbitration agreements and Swiss law, the arbitrators have no power to consolidate ...."); *id.* at § C(3) (citing a Swiss federal tribunal case in support of its decision that a consolidated arbitration was appropriate); *id.* at § D(1) (Respondents contend that "[s]uch solution is not acceptable under the applicable Swiss law").

As but one example, Pertamina cited Swiss procedural law in arguing that the Tribunal could not consolidate the claims under the JOC and ESC into one proceeding. Pertamina at no point argued to the Tribunal that Indonesian procedural law applied. Pertamina initially sought to set aside the Award in a Swiss court.[46] Pertamina asked the Texas district court to stay its enforcement proceeding until Pertamina's appeal in Switzerland was resolved. In making this argument, Pertamina stated that "[t]he arbitration ... was conducted according to the laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland.... KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration."[47]

The Tribunal's decision that Swiss arbitral law applied does not make the Award unenforceable.[48]

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[46] In the district court, Pertamina presented an affidavit and report from an expert on international commercial arbitration that weakly attempted to explain the appeal to the Swiss court as a mistake. The theory that Pertamina's lawyers erred and applied to the wrong court for annulment-and then moved for reconsideration when that court dismissed the appeal-is utterly without support in the record.

[47] *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) (citations omitted) ("[I]f an 'arbitrator is even arguably construing or applying [a] contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.' ").

[48] *Europcar Italia*, 156 F.3d at 315; *Nat'l Wrecking Co.*, 990 F.2d at 960;*see Garvey*, 532 U.S. at 509, 121 S.Ct. 1724 ("Courts are not authorized to review [an] arbitrator's decision on the merits despite allegations that the decision rests on factual

The combination of the parties' selection of Switzerland as the site of the arbitration; the failure clearly or expressly to choose Indonesian arbitral law in their agreements, as required to select arbitral law other than that of the place of the arbitration; and the clear evidence provided by the parties' own conduct that they intended Swiss law to apply to the arbitration, amply supports the district court's determination that the Tribunal properly applied Swiss procedural law.

The district court also found that under the doctrine of judicial estoppel, Pertamina's prior conduct precluded it from arguing against the application of Swiss procedural law. The doctrine prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or earlier proceedings.[49] "The policies underlying the doctrine include preventing internal inconsistency, precluding litigants from 'playing fast and loose' with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment."[50] Fifth Circuit courts have identified two

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errors or misinterprets the parties' agreement.").

[49] *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir.2003); *see In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir.1999) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988)) (describing judicial estoppel as "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position"); *see also Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir.2000); *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598-600 (5th Cir.1996).

[50] *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir.1993).

limitations on judicial estoppel: (1) the position of the party to be estopped must be clearly inconsistent with its prior position; and (2) the court must have accepted that prior position.[51] Judicial acceptance requires that the court adopted the position previously urged by a party, whether as a preliminary matter or as part of a final disposition.[52]

The district court did not abuse its discretion in imposing judicial estoppel to preclude Pertamina from arguing against the application of Swiss procedural law. Pertamina repeatedly represented to the Tribunal and to the district court that Swiss procedural law controlled the arbitration.[53] Both the Tribunal and the district court relied on these representations in their decisionmaking. In the Award, the Tribunal accepted Pertamina's argument that Swiss procedural law applied. The district court adopted Pertamina's position that Swiss law applied in delaying the enforcement proceedings pending the Swiss court's resolution of the appeal.[54] Pertamina's argument that Indonesian procedural law governed the arbitration is clearly inconsistent with its prior position that Swiss procedural law controlled.[55]

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[51] *Hall*, 327 F.3d at 396; *Ahrens*, 205 F.3d at 833; *Coastal Plains*, 179 F.3d at 206.

[52] *Coastal Plains*, 179 F.3d at 206.

[53] *See* note 24.

[54] *See Coastal Plains*, 179 F.3d at 206 (noting that the acceptance prong of judicial estoppel can be satisfied by a court's acceptance of a party's position "as a preliminary matter").

[55] *See Hall*, 327 F.3d at 396; *Ahrens*, 205 F.3d at 833; *Coastal Plains*, 179 F.3d at 206.

Pertamina belatedly suggests that its positions are not inconsistent because the New York Convention permits multiple primary jurisdictions. As addressed more fully below, this record makes it clear that only the Swiss courts had primary jurisdiction over this Award. Judicial estoppel provides an additional ground for concluding that Swiss procedural law applied to the arbitration proceeding.[56]

C. The Procedural Challenges to the Arbitral Award

1. Consolidation of the Claims under the JOC and ESC into One Arbitration Proceeding

Under Article V(1)(d) of the New York Convention, a court may refuse to enforce an arbitration award if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."[57] Pertamina argues that because the JOC and ESC were separate contracts with separate arbitration clauses, and because neither contract

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[56] *See Hall*, 327 F.3d at 396; *Coastal Plains*, 179 F.3d at 206;*Ahrens*, 205 F.3d at 833. The High Court of Hong Kong Court estopped Pertamina from asserting application of Indonesian procedural law for the same reasons. *Hong Kong decision* at 9-12. The High Court also emphasized the dilatoriness of Pertamina's argument: "Pertamina's position on the [applicable procedural law] only changed 30 months after the preliminary award was published, 15 months after the Final award (December 2000) and seven months after the Swiss Court dismissed the petition for revision (August 2001)." *Id.* at 11.

[57] 9 U.S.C. § 201, Art. V(1)(d).

expressly allowed the consolidation of claims, the Tribunal improperly consolidated the claims into one arbitration proceeding. Pertamina also contends on appeal that because Indonesian rather than Swiss procedural law governed the arbitration, the Tribunal's reliance on Swiss procedural law to consolidate the claims was erroneous.

The Tribunal carefully analyzed the parties' contracts in concluding that a consolidated arbitration of KBC's claims against Pertamina and PLN under the JOC and ESC was appropriate. In factual findings set out in the Preliminary Award, the Tribunal set out the basis for concluding that the two contracts were integrated such that "the parties did not contemplate the performance of two independent contracts but the performance of a single project consisting of two closely related parties."[58] The Tribunal continued:

In such circumstances, the conclusion of this Arbitral Tribunal is that KBC's single action should be admitted, provided it is appropriate. The Arbitral Tribunal has not the slightest doubt in this respect. Due to the integration of the two contracts and the

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[58] Article 15.3 of the ESC provided that "the terms of [the ESC] and the Joint Operation Contract constitute the entire agreement between the parties hereto." Article 1.2 of the JOC stated that "[e]ach such Energy Sales Contract shall be an integral part of this contract, and to the extent the provisions of the Energy Sales Contract obligate the parties hereto, shall be deemed incorporated into this contract for all purposes." Pertamina and KBC entered into the JOC and ESC on the same day. The JOC and the ESC contained virtually identical arbitration provisions.

fact that the Presidential Decrees, the consequences of which are at the origin of the dispute, affected both of them, the initiation of two separate arbitrations would be artificial and would generate the risk of contradictory decisions. Moreover, it would increase the costs of all the parties involved, an element of special weight in the light of difficulties faced by the Indonesian economy, to which counsel for [Pertamina] legitimately drew the Arbitral Tribunal's attention. The record provides ample support for the Tribunal's findings and conclusion that the two contracts were integrated such that the parties contemplated a single arbitration.

The Tribunal cited the Swiss law concept of "connexity" in analyzing the legal relations among KBC and Pertamina under the JOC and KBC, Pertamina, and PLN under the ESC as one of the factors justifying the consolidation of claims under the two contracts into one arbitration proceeding. The Tribunal concluded that the relationship of the JOC and ESC exceeded the standard of "connexity" under Swiss law. "The use of the word 'connexity' to describe the relationship between the JOC and the ESC would be an understatement. In reality, the two contracts are integrated." Courts and arbitration tribunals have recognized that claims arising under integrated contracts may be consolidated into single arbitrations.[59] The Tribunal cited one other factor

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[59] *See, e.g., Conn. Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada*, 210 F.3d 771, 774 (7th Cir.2000); *Maxum Found., Inc. v. Salus Corp.*, 817 F.2d 1086, 1087-88 (4th Cir.1987). Pertamina cites cases decided under the FAA and the law of different American jurisdictions for the proposition that courts do not have the authority to order arbitrations without the

that supported consolidation: "appropriateness." The parties agreed to the application of the UNCITRAL Rules, which permit a tribunal to conduct an arbitration "in such manner as it considers appropriate."[60] Pertamina does not dispute the application of the UNCITRAL Rules to the arbitration proceeding.

Courts are reluctant to set aside arbitral awards under the New York Convention based on procedural violations, reflected in cases holding that the Convention embodies a proenforcement bias.[61] The Tribunal emphasized in its Preliminary Award that although the claims would be consolidated, "the

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parties' approval. *See, e.g., Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) ("The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation...."); *Gov't of the United Kingdom of Great Britain and N. Ireland v. Boeing Co.,* 998 F.2d 68, 74 (2d Cir.1993); *Protective Life Ins. Corp. v. Lincoln Nat. Life Ins. Corp.,* 873 F.2d 281, 282 (11th Cir.1989). These cases do not involve contracts so closely related as to manifest the parties' agreement to be joined in arbitration proceedings involving parties and claims under those integrated contracts.

[60] UNCITRAL Arbitration Rules at Art. 15(1).

[61] *See, e.g., China Minmetals Materials Imp. and Exp. Co., Ltd. v. Chi Mei Corp.,* 334 F.3d 274, 282-83 (3d Cir.2003); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.,* 284 F.3d 1114, 1120 (9th Cir.2002); *Alghanim,* 126 F.3d at 20;*Parsons & Whittemore Overseas,* 508 F.2d at 973; *Compagnie des Bauxites de Guinee v. Hammermills, Inc.,* 1992 WL 122712, at *5 (D.D.C. May 29, 1992); *Am. Constr. Mach. & Equip. Corp. Ltd. v. Mechanised Constr. of Pakistan, Ltd.,* 659 F.Supp. 426, 428 (S.D.N.Y.1987).

position of each party has to be considered independently when discussing the substance of the case, on the basis of their respective legal and contractual situations." The record reflects that the Tribunal kept this promise. There is no prejudice arising from the consolidation that would justify a refusal to enforce the Award.

2. The Composition of The Tribunal

Under Article V(1)(d), a court may refuse enforcement of an arbitral award if the composition of the tribunal is not in accordance with the parties' agreement.[62] The JOC provided for the appointment of arbitrators, as follows:

Each Party [KBC and Pertamina] will appoint an arbitrator within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes.

The ESC procedure for arbitrators' appointment was slightly different:

> PLN on one hand, and [KBC] and PERTAMINA, on the other hand, will each appoint one arbitrator, in each case within

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[62] 9 U.S.C. § 201, Art. V(1)(d).

> thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes, upon the request of any Party.

Each contract required the appointment of arbitrators within thirty days of the notice of arbitration and provided for appointment by the ICSID in the event that a party did not do so.

In its notice of arbitration sent to Pertamina, KBC appointed Professor Piero Bernardini to serve as an arbitrator. Pertamina did not designate an arbitrator within thirty days, nor did it object to KBC's selection at that time. By letter dated June 2, 1998, KBC notified the ICSID of Pertamina's inaction and requested the appointment of a second arbitrator under the default appointment provisions of the contracts. Pertamina did not respond to this letter. The ICSID questioned KBC about the consolidation of claims under the JOC and the ESC and KBC's unilateral appointment of an arbitrator. KBC responded by letter dated June 22, 1998. The ICSID confirmed receipt of KBC's letters and in a June 29, 1998 letter to all parties, recapped the prior correspondence, noted Pertamina's failure to respond, and expressed its intent to grant KBC's request to appoint the second arbitrator. The ICSID

Secretary-General identified Dr. Ahmed El-Kosheri as its candidate and asked for any objections by July 13, 1998. The ICSID sent all the preceding correspondence to PLN by courier and to Pertamina by fax and courier. Despite the Secretary-General's invitation to do so, neither Pertamina nor PLN lodged objections or responses to the proposed appointment. On July 13, 1998, having received no communications from Pertamina, the ICSID notified Pertamina and PLN of its intent to appoint Dr. El-Kosheri and made the appointment on July 15, 1998. Under the JOC and ESC, Professor Bernardini and Dr. El-Kosheri then selected the chairman of the arbitration panel, Yves Derains.

In its Preliminary Award, the Tribunal rejected Pertamina's argument that KBC's selection of an arbitrator violated the ESC's requirement that KBC and Pertamina jointly make the nomination. The Tribunal found that the parties intended to limit that requirement to disputes in which PLN was opposed to KBC and Pertamina. Because the ESC did not expressly address the method for appointing arbitrators when KBC and Pertamina opposed each other, the Tribunal found that UNCITRAL Arbitration Rules for appointment applied. The Tribunal ruled that the appointment procedures used did not violate these rules or create an inequality of treatment. The Tribunal emphasized Pertamina's failure to nominate an arbitrator or object to those nominated. The district court agreed with the Tribunal's reasoning and added that Pertamina had failed to demonstrate any prejudice from the appointment proceedings.

On appeal, Pertamina reasserts its argument that KBC's unilateral selection of an arbitrator violated the ESC's requirement that "PLN on the one hand and [KBC] and Pertamina, on the other hand, will each appoint one arbitrator." Pertamina contends that its interests would always be aligned with KBC under the ESC, which required PLN to purchase from Pertamina the electricity that KBC provided, and that this explains the contractual requirement that KBC and Pertamina agree on an arbitrator in a dispute arising under that contract. In response, KBC argues that the Tribunal correctly found that a dispute between KBC and Pertamina was possible under the ESC, but in the event of such a dispute, the ESC did not provide a procedure for choosing an arbitrator. KBC asserts that the Tribunal correctly found that the general UNCITRAL rules for selecting an arbitrator would apply, under which KBC, Pertamina, and PLN would each appoint an arbitrator. In addition, KBC argues that the district court correctly found that Pertamina had failed to object to KBC's selection of Professor Bernardini as an arbitrator and failed to nominate an arbitrator despite the ICSID's requests. Finally, KBC argues that Pertamina cannot show prejudice that would make the Award unenforceable.

The ESC arbitration clause refers to "any dispute or difference of any kind whatsoever" arising among "the Parties." Section 2 of the ESC defines "parties" to include PLN, Pertamina, and KBC. By its terms, the arbitration clause covers a dispute between KBC and Pertamina arising under the ESC, as well as a dispute in which the interests of KBC and Pertamina are aligned. If the ESC required KBC and Pertamina

jointly to select an arbitrator for disputes in which KBC and Pertamina were opposed, as Pertamina contends, Pertamina could effectively block arbitration under the ESC simply by refusing to agree with KBC to the selection of an arbitrator. Such an interpretation would make the ESC arbitration clause illusory. In addition, Pertamina had numerous opportunities early in the proceedings to object to KBC's selection of Professor Bernardini as an arbitrator and to nominate its own arbitrator. Pertamina did not challenge the composition of the arbitral panel until after the entire panel had been selected and seated. Pertamina's failure timely to object to Professor Bernardini's selection and to nominate its own arbitrator was, as the district court noted, a strategic decision that Pertamina should not now be able to assert as a defense to enforcing the Award.[63]

Pertamina has failed to meet its burden of showing that the Tribunal was improperly constituted. The Tribunal reasonably interpreted the ESC's arbitration provisions and reasonably applied the UNCITRAL arbitration rules. Despite numerous opportunities, Pertamina failed to challenge the Tribunal's composition until after the arbitrators were selected. The procedural infirmities Pertamina alleges do not provide grounds for denying

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[63] Pertamina apparently argued to the Tribunal that it did not name an arbitrator because it was contesting the legitimacy of the arbitration and further contended that it did not receive certain correspondence from ICSID regarding KBC's request that the ICSID appoint a second arbitrator. Pertamina, however, did not make these arguments before the district court.

enforcement of the Award.

D. The Due Process Challenges to the Arbitral Award

Under Article V(1)(b), enforcement of a foreign arbitral award may be denied if the party challenging the award was "not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present [its] case."[64] Article V(1)(b) "essentially sanctions the application of the forum state's standards of due process," in this case, United States standards of due process.[65] A fundamentally fair hearing requires that a party to a foreign arbitration be able to present its case.[66] A fundamentally fair hearing is one that "meets 'the minimal requirements of fairness'-adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator."[67] The parties must have an opportunity to be heard "at a meaningful time and in a meaningful manner."[68] "The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil

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[64] 9 U.S.C. § 201, Art. V(1)(b).

[65] *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir.1992) (quoting *Parsons & Whittemore Overseas*, 508 F.2d at 975).

[66] *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir.2001); *Generica, Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir.1997).

[67] *Slaney*, 244 F.3d at 592 (quoting *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1295 (9th Cir.1987)); *Generica*, 125 F.3d at 1130 (quoting same).

[68] *Iran Aircraft Indus.*, 980 F.2d at 146 (citations omitted).

Procedure."[69]

1. The Claim that the Final Award "Reversed" the Preliminary Award

Pertamina first contends that the Tribunal reversed the Preliminary Award in the Final Award without notice, denying Pertamina the opportunity to be "meaningfully heard." Pertamina emphasizes the Tribunal's ruling that "a governmental decision which prevents KBC [from] perform[ing] its obligations is not deemed to be a breach of contract by Pertamina or PLN but a Force Majeure event excusing KBC's nonperformance."

The Tribunal stated in the Preliminary Award that the force majeure clause in the JOC and ESC made a "government-related event" an event of force majeure only with respect to KBC. The Tribunal stated that Pertamina and PLN were so closely related to the Indonesian government that a decision by the Indonesian government was not a force majeure event as to them. In its briefing before the Tribunal made its Final Award, KBC argued that under the contract language and given the close relationship between Pertamina and the Indonesian government, Pertamina bore the risk of loss from a force majeure event under the JOC and ESC. Pertamina responded that in the Preliminary Award, the Tribunal had ruled that acts of force majeure by the Indonesian government are not breaches of the

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[69] *Matter of Arbitration Between Trans Chem. Ltd. and China Nat. Mach. Imp. & Exp. Corp.*, 978 F.Supp. 266, 310 (S.D.Tex.1997), *aff'd*, 161 F.3d 314 (5th Cir.1998).

JOC and ESC and that to award KBC damages would be incompatible with that ruling. In the Final Award, the Tribunal found that the Indonesian government's actions were an event of force majeure that excused KBC's failure to perform under the JOC and ESC. The Tribunal stated that this finding did not contradict its ruling in the Preliminary Award that the Indonesian government was not a party to the JOC or ESC, because that ruling "was not meant to express any view as to the consequences to Pertamina ... of a Governmental decision which prevents the performance of the Contracts."

The record shows that Pertamina knew it could be found liable for nonperformance after the Preliminary Award had issued. After the Preliminary Award issued, KBC argued to the Tribunal that Pertamina bore the risk of nonperformance under the JOC and ESC in the event of force majeure. KBC's argument clearly assumed that the Preliminary Award allowed the Tribunal to find that the contracts placed the risk of, and liability for, such nonperformance on Pertamina. In response to that argument, Pertamina had, and took, the opportunity fully to present its arguments against KBC's theory of liability.

The Final Award shows that the Tribunal considered and rejected Pertamina's argument in making its liability decision. The Tribunal concluded that the JOC and ESC allocated the risk of government interference with the project solely to Pertamina and PLN. In this enforcement proceeding, Pertamina is essentially repeating the arguments it made to the Tribunal. The fact that those arguments

were presented to and considered by the Tribunal is inconsistent with Pertamina's claim that it had no notice of the need to make the argument to that Tribunal or the opportunity to do so. Pertamina did not suffer the fundamental unfairness it claims, so as to support a refusal to enforce the Award.[70]

2. The Tribunal's Denial of a Continuance and Request for Additional Discovery

To challenge KBC's contention that FPL was willing to finance the project, Pertamina sought in the arbitration proceeding a continuance and discovery of the following documents from KBC, FPL, and Caithness regarding the financing of the KBC project:

> (1) All documents relating to efforts to obtain financing for the Karaha-Bodas project during the period September 1997 through June 1998.
> (2) All documents showing any consideration of providing direct financing (whether through bridge financing, a loan guarantee, or direct equity investment) for the Karaha-Bodas project during the period September 1997 through June 1998.
> (3) All documents relating to FPL's, its subsidiaries', or its predecessors' consideration of whether to invest in the Karaha-Bodas project.
> (4) All documents relating to FPL's, its

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[70] *See Europcar Italia*, 156 F.3d at 315 ("Absent extraordinary circumstances, a confirming court is not to reconsider the arbitrator's findings.").

> subsidiaries', or its predecessors' decision to invest in the Karaha-Bodas project, stated variously to have occurred in mid-1996 or mid-1997.
>
> (5) All documents sent by KBC to FPL, its subsidiaries, or its predecessors following the investment identified in ¶ 4 and concerning geothermal exploration and development in the Karaha-Bodas concession area (whether such exploration occurred before or after the investment).
>
> (6) All documents relating to evaluation by each, any and all of KBC, FPL (or subsidiaries or predecessors), and Caithness whether to proceed with the Karaha-Bodas project during the period September 1997 through June 1998.

The Tribunal denied Pertamina's request.

After Pertamina discovered that FPL and certain other investors in KBC owned a political risk insurance policy underwritten by Lloyd's of London, which had paid $75 million after the project suspension, Pertamina sought reconsideration of the district court's summary judgment enforcing the Award under Rule 60(b). The district court found that Pertamina's inability to introduce evidence of the insurance policy at the arbitration did not prevent the presentation of its case to the Tribunal. The district court also held that KBC's failure to bring the insurance policy to the Tribunal's attention did not make enforcing the Award a violation of public policy. We agree.

"An 'arbitrator is not bound to hear all of the

evidence tendered by the parties.... [He] must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments.' "[71] It is appropriate to vacate an arbitral award if the exclusion of relevant evidence deprives a party of a fair hearing.[72] "Every failure of an arbitrator to receive relevant evidence does not constitute misconduct requiring vacatur of an arbitrator's award. A federal court may vacate an arbitrator's award only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings."[73]

Although the Tribunal denied Pertamina the specific discovery it sought on the issue of FPL financing, Pertamina was able to cross-examine the KBC witnesses who testified that FPL was willing to provide financing for the project, Leslie Gelber and Robert McGrath. Before those witnesses testified, Pertamina had already presented substantial evidence in its response to KBC's Statement of Claim as to why KBC would not have been able to secure financing for the project, emphasizing the depressed state of the Indonesian economy and its unattractiveness to investors. Pertamina argued to

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[71] *Generica*, 125 F.3d at 1130 (quoting *Hoteles Condado Beach, La Concha and Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir.1985)); *see Slaney*, 244 F.3d at 592 (cautioning that "parties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena").

[72] *Generica*, 125 F.3d at 1130; *Slaney*, 244 F.3d at 592.

[73] *Hoteles Condado Beach*, 763 F.2d at 40 (internal citations omitted).

the Tribunal that KBC had presented no documentary evidence of FPL's willingness to finance the project and asserted that FPL would have required such a high rate of interest because of the risk involved as to make the KBC venture unprofitable.

The Tribunal found that "the issue remained open in 1998 of the terms and conditions upon which financing could have been obtained for the Project development." The Tribunal noted that "the worsening of the economic and political situation in Indonesia at the time has to be taken into account as regards both the conditions at which financing could have been obtained and possible delays in arranging the same." The Tribunal, however, noted that the parties contemplated the possibility of a delay in arranging financing, because the ESC provided that the contract could be suspended for up to two years if KBC was unable to arrange financing for the project. The Tribunal also noted KBC's efforts to reinstate the project after the initial government suspension order, finding that KBC was ready and willing to secure financing for the project. The Tribunal found the testimony of KBC's witnesses on financing credible, stating that it had "no reason ... to cast doubts about KBC's readiness, directly and/or through its shareholders, to make provision thereof." In determining the lost profits, the Tribunal considered all the risks of the project, including the potential difficulties in arranging financing that Pertamina cited, and "significantly reduc[ed]" the amount of lost profits claimed by KBC.

In *Generica, Ltd. v. Pharmaceutical Basics, Inc.*,[74] the party opposing enforcement of an international arbitration award argued that the tribunal curtailed cross-examination of a witness, in violation of the party's due process right to present its case.[75] The tribunal, recognizing that it had curtailed the cross-examination, placed diminished reliance on the witness's testimony.[76] The court found that by limiting the reliance on the witness's testimony, the arbitrators eliminated the possibility of prejudice to the party claiming a due process violation.[77] The court confirmed the award.[78] As in *Generica,* the Tribunal appears to have given all the evidence as to damages, including the availability of financing, appropriate weight in determining liability and damages.

In *Tempo Shain Corp. v. Bertek, Inc.*,[79] the arbitral panel did not allow a potential witness to testify on the basis that the witness's testimony was cumulative.[80] The court vacated the arbitral award.[81] The record showed that the witness would have testified to facts that only he could have known, making his testimony essential.[82] Similarly, in

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74 125 F.3d 1123 (7th Cir.1997).

75 *Id.* at 1129-31.

76 *Id.* at 1131.

77 *Id.*

78 *Id.*

79 120 F.3d 16 (2d Cir.1997).

80 *Id.* at 20.

81 *Id.* at 21.

82 *Id.* at 20.

Hoteles Condado Beach, La Concha and Convention Center v. Union De Tronquistas Local 901,[83] the court vacated an award because the arbitral panel refused to give any weight to the only evidence available to the losing party.[84] In the present case, by contrast, the Tribunal's language in the Final Award and the record show that the testimony about FPL's willingness to provide financing was only one factor relevant to damages. KBC raised the possibility of FPL's direct financing only in response to Pertamina's affirmative defense that KBC could not have financed the project. Pertamina did not seek discovery on KBC's efforts to finance the project in the arbitration proceeding until after KBC filed its rebuttal to the response to the Statement of Claim, despite the fact that Pertamina raised the issue as an affirmative defense.

The record shows that the Tribunal's refusal to grant a continuance and additional prehearing discovery did not "so affect the rights of [Pertamina] that it may be said that [it] was deprived of a fair hearing."[85] Pertamina was able to present comprehensive evidence of investment conditions in Indonesia and expert opinions on the availability of financing, as well as cross-examine Gelber and McGrath on FPL's asserted willingness and ability to provide financing.[86]

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[83] 763 F.2d 34 (1st Cir.1985).

[84] *Id.* at 40.

[85] *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir.1968).

[86] Pertamina acknowledges that it specifically examined Gelber and McGrath about the existence of documents

Pertamina contends that the late revelation of the political risk insurance policy refutes KBC's contention in the arbitration that FPL was willing to finance KBC to protect the $40 million it had previously invested in KBC. The existence of the political insurance policy was not "central or decisive" to Pertamina's case.[87] In order to show damages, KBC had to show that if the project had not been suspended, KBC could have proceeded to perform by obtaining financing. The record amply supports KBC's position that KBC and FPL had already invested substantial money before the Indonesian government issued its suspension order. The existence of the political risk insurance policy is not inconsistent with the testimony of Gelber and McGrath that FPL intended to finance the project and would have done so but for the suspension decreed by the government of Indonesia. The existence of political risk insurance for the project is not inconsistent with FPL's willingness to invest had the project not been suspended, that is, if the risk insured against had not occurred. The Tribunal's damages analysis and the lost profits award

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regarding FPL's willingness to finance the project. Pertamina states that the Tribunal had to instruct McGrath to answer the question directly, demonstrating that McGrath was an "evasive" witness. The Tribunal observed McGrath testify and was able to make the credibility judgment that he either lacked knowledge of such documents or was unwilling to discuss them. *Cf. United States v. Garza*, 118 F.3d 278, 283 (5th Cir.1997) (noting that a district court is in the best position to judge the credibility of witnesses and refusing to "second-guess" the lower court's judgment on the issue).

[87] *Cf. Hoteles Condado Beach*, 763 F.2d at 40 (denial of party's only evidence was ground for vacating award).

depended on the assumption that the project continued, that is, that the suspension had not taken place.

Pertamina's argument that KBC's political risk insurance policy undermines the Tribunal's finding that the JOC and ESC placed the risk of a government-related event on Pertamina is also unavailing. The Tribunal determined that the JOC and ESC placed the risk of nonperformance due to a government-related event on Pertamina based on a well-reasoned, detailed analysis of the contract terms.[88] The existence of a political risk policy does not undermine this result. Moreover, the political risk policy contained a subrogation provision that required KBC to reimburse the insurer if KBC recovered its losses from another source.[89] The

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[88] *See, e.g., Talman Home Fed. Sav. & Loan Ass'n of Ill. v. Am. Bankers Ins.*, 924 F.2d 1347, 1351 (5th Cir.1991) (quoting *Republic Nat'l Bank of Dallas v. Nat'l Bankers Life Ins. Co.*, 427 S.W.2d 76, 79 (Tex.App.-Dallas 1968, writ ref'd)) ("The cardinal rule of construction as applied to all contracts is to ascertain the intention of the parties as expressed in the language used in the instrument itself. It is the intention and purpose of contracting parties, as disclosed within the four corners on the instrument which should control.").

[89] This subrogation provision undermines Pertamina's additional argument that, in the alternative, it is entitled to a $75 millior offset from the political risk insurance payout. Pertamina argues that enforcement of the judgment, in combination with the insurance proceeds, will permit KBC double recovery in violation of the single-satisfaction rule. *See Tompkins v. Cyr*, 202 F.3d 770, 785 (5th Cir.2000). The subrogation provision of the political risk insurance policy, however, requires that to the extent the insured obtains any recovery from a judgment against Pertamina, the insured is obligated to repay the insurer. In addition, payment by a

existence of the political risk policy is not inconsistent with the contractual allocation of risk.

The Tribunal asked McGrath whether FPL had purchased "OPIC insurance," a form of political risk insurance. McGrath responded that he did not know the answer to the question. Pertamina's counsel did not follow up on the Tribunal's questioning. At the conclusion of the hearing, the Tribunal chair asked the parties whether the discovery requests were "maintained, all of them, part of them, because we would like to know on what we have to decide." The response from counsel for Pertamina was as follows:

> [T]he purpose of discovery is to prepare for the hearing, it is not to supplement the record after the hearing. So I think the discovery requests are moot, and if discovery is now permitted, then you have to re-open the proceedings and so on. So I treated, notwithstanding the fact that it was theoretically open, I treated this request as effectively being denied, and we went forward. Our request went to the purported financial ability, the purported financing that would have been made available and other things, and I think the record on that has been fully made. I am prepared to rest on that record, and so I think the discovery requests should no longer be in the picture.

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collateral source does not typically diminish a judgment debt. *See Global Petrotech, Inc. v. Engelhard Corp.*, 58 F.3d 198, 202 (5th Cir.1995). There will be no double recovery, and Pertamina is not entitled to a credit.

The parties submitted extensive posttrial briefs. In the Final Award, issued in December 2000, the Tribunal stated that all parties had "waived their respective requests for discovery" at the conclusion of the hearing.

Pertamina asserts that it did not waive its requests for discovery because the Tribunal denied the request before the hearing, when the discovery could have been of use. Pertamina ignores the fact that in international commercial arbitration, it is not uncommon to ask for additional discovery or information after a hearing, to request additional sessions of a hearing to submit more evidence, or to file posthearing submissions.[90] Rather than renew its requests for discovery into FPL's willingness to finance the project or to assert a request for discovery into FPL's political risk insurance, Pertamina's counsel expressly stated that the record had been "fully made" and that he was "prepared to rest on the record." The record supports the Tribunal's

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[90] *See, e.g., UNCITRAL Arbitration Rules* at Art. 15(2), 29(2) (stating that a party may request at any stage of the proceeding a hearing for presentation of evidence and that a tribunal may reopen hearings at any time upon request of a party); Jay E. Grenig, *Alternative Dispute Resolution with Forms*, § 5.76 (2d ed.1997) (including in a description of the customary order of arbitration proceedings the "submission of post-hearing briefs"). *See also Lincoln Nat'l Life Ins. Co. v. Payne*, 286 F.Supp.2d 1023, 1026 (S.D.Iowa 2003); *Techcapital Corp. v. Amoco Corp.*, 2001 WL 267010, at * 2 (S.D.N.Y. March 19, 2001); *Mays v. Lanier Worldwide, Inc.*, 115 F.Supp.2d 1330, 1342 (M.D.Ala.2000); *I. Appel Corp. v. Katz*, 1999 WL 287370, at * 3 n. 2 (S.D.N.Y. May 6, 1999); *United Foods, Inc. v. W. Conference of Teamsters Pension Trust Fund*, 816 F.Supp. 602, 607 (N.D.Cal.1993).

conclusion that the discovery requests made before the hearing had been waived. Pertamina did not ask for discovery into political risk insurance until it filed its Rule 60(b) motion in the district court.

The Tribunal's denial of a continuance and additional discovery did not prevent Pertamina from presenting its case, so as to deprive it of a fair hearing. Pertamina presented ample evidence in support of its position that KBC would be unable to find financing. The Tribunal considered Pertamina's evidence and gave it considerable weight, awarding KBC damages substantially lower than the amount it sought.[91] Pertamina has failed to show the prejudice required to decline enforcement of the Award on this ground.

3. The District Court's Denial of Pertamina's Rule 56(f) Discovery Request

In the district court, after KBC moved for summary judgment on its application to enforce the Award, Pertamina moved for a continuance under Rule 56(f) and sought the same discovery on FPL's willingness and ability to provide project financing that it had sought in the arbitration. The district court denied the Rule 56(f) motion.

The denial of a Rule 56(f) discovery request is

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[91] KBC sought $512.5 million in lost profits. The Tribunal awarded KBC $150 million in lost profits. The Tribunal also awarded KBC $111.1 million in lost expenditures.

reviewed for abuse of discretion.[92] The district court may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts.[93] "If it appears that further discovery will not produce evidence creating a genuine issue of material fact, the district court may, in the exercise of its discretion, grant summary judgment."[94] As one court has explained:

> In judging discovery requests in this context [of an arbitration award confirmation proceeding], the court must weigh the asserted need for hitherto undisclosed information and assess the impact of granting such discovery on the arbitral process. The inquiry is an entirely practical one, and is necessarily keyed to the specific issues raised by the party challenging the award and the degree to which those issues implicated factual questions that cannot be reliably resolved without some further disclosure.[95]

The record shows that in the arbitration, Pertamina was able to present substantial evidence regarding the Indonesian economy, the problems in securing financing for projects in Indonesia, and the projected electrical generating capacity of the project.

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[92] *Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp.*, 992 F.2d 1398, 1401 (5th Cir.1993).

[93] *Int'l Shortstop v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir.1991).

[94] *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir.1993).

[95] *Lummus Global Amazonas S.A. v. Aguaytia Energy del Peru S.R. Ltda.*, 256 F.Supp.2d 594, 626 (S.D.Tex.2002) (citations omitted).

The Tribunal took Pertamina's arguments into account in awarding significantly less in lost profits than KBC had sought. The Tribunal did not solely rely on FPL's willingness to finance the project in determining that KBC was ready to "directly, and/or through its shareholders," finance the project. The Tribunal also looked to KBC's efforts to convince the Indonesian government to restart the project in making this finding. The record supports the district court's denial of a continuance to permit further discovery on KBC's ability to finance the project.

The district court also noted Pertamina's counsel's statement at the conclusion of the arbitration hearing that "the record on [the financing issue] ha[d] been fully made." Pertamina has failed to show that the discovery it sought in the district court would have created disputed fact issues material to determining whether Pertamina received a fundamentally fair hearing before the Tribunal.[96] Because the issue of financing could be reliably resolved without the requested discovery, the district court did not abuse its discretion in denying Pertamina's Rule 56(f) motion.[97]

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[96] *See Krim*, 989 F.2d at 1442.

[97] *See Lummus Global Amazonas*, 256 F.Supp.2d at 626; *Resolution Trust Corp.*, 992 F.2d at 1401. For the same reasons, the district court did not err by refusing to permit additional discovery or host an evidentiary hearing before ruling on Pertamina's Rule 60(b) motion. *See Provident Life and Accident Ins. Co. v. Goel*, 274 F.3d 984, 999 (5th Cir.2001) (noting that the only issues on an appeal of a Rule 60(b) motion are the propriety of the denial of relief and whether the district court abused its discretion in denying relief).

E. The Public Policy Challenge to the Arbitral Award

Pertamina asserts that the Award violated public policy because it violated the international law doctrine of abuse of rights. Pertamina contends that the Award imposes punishment for obeying a government decree. Pertamina also asserts that KBC's failure to disclose the political risk insurance policy during the arbitration makes enforcement of the Award a violation of public policy.

Under Article V(2)(b) of the New York Convention, a court may refuse to recognize or enforce an arbitral award if it "would be contrary to the public policy of that country."[98] The public policy defense is to be "construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice."[99] "The general pro-enforcement bias informing the convention ... points to a narrow reading of the public policy defense."[100] Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.[101]

An action violates the abuse of rights doctrine if

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98 9 U.S.C. § 201, Art. V(2)(b).

99 *M & C Corp.*, 87 F.3d at 851 n. 2 (quoting *Fotochrome, Inc. v. Copal Co., Ltd.*, 517 F.2d 512, 516 (2d Cir.1975)); *see Parsons & Whittemore Overseas*, 508 F.2d at 974; *Slaney*, 244 F.3d at 593.

100 *Parsons & Whittemore Overseas*, 508 F.2d at 973.

101 *Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc.*, 2000 WL 435566, at *12 (D.Conn. March 14, 2000).

one of the following three factors is present: (1) the predominant motive for the action is to cause harm; (2) the action is totally unreasonable given the lack of any legitimate interest in the exercise of the right and its exercise harms another; and (3) the right is exercised for a purpose other than that for which it exists.[102] The abuse of rights doctrine is not established in American law[103] and KBC's actions do not meet the factors required to trigger its application. The evidence in the record is that KBC pursued the arbitration to recover its costs, expenses, and lost profits from the nonperformance of the JOC and ESC.[104] The record does not support Pertamina's argument that enforcing the Award penalizes obedience to a governmental decree. The Tribunal explained in the Final Award that the JOC and ESC shifted the risk of loss resulting from a government-ordered suspension onto Pertamina and PLN. Pertamina is challenging the substance of the Tribunal's interpretation of the JOC and ESC. An arbitration tribunal's contract interpretation does not violate public policy unless it "violates the most basic notions of morality and justice."[105] The Tribunal's interpretation of the JOC and ESC does not approach this steep threshold.

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[102] Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 Pac. L.J. 37, 47 (Fall 1995).

[103] The abuse of rights doctrine is not even fully established in Louisiana, the American jurisdiction that has invoked it. *See Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190, 1193 n. 4 (5th Cir.1992).

[104] *See* Perillo, 27 Pac. L.J. at 47.

[105] *Slaney*, 244 F.3d at 593.

KBC's failure to disclose the political risk insurance policy does not provide a basis for refusing to enforce the Award. Enforcement of an arbitration award may be refused if the prevailing party furnished perjured evidence to the tribunal or if the award was procured by fraud.[106] Courts apply a three-prong test to determine whether an arbitration award is so affected by fraud: (1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud materially related to an issue in the arbitration.[107] It is not necessary to establish that the result of the arbitration would have been different if the fraud had not occurred.[108] Courts, however, have held that an arbitration award is not fraudulently obtained when the protesting party had an opportunity to rebut his opponent's claims at the hearing.[109]

In *Biotronik Mess-Und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*,[110] the party opposing enforcement of the award argued that the prevailing party knowingly withheld evidence of an

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[106] *Karppinen v. Karl Kiefer Mach. Co.*, 187 F.2d 32, 34 (2d Cir.1951).

[107] *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir.1988).

[108] *Id.*

[109] *See Biotronik Mess-Und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co.*, 415 F.Supp. 133, 137-38 (D.N.J.1976).

[110] 415 F.Supp. 133 (D.N.J.1976).

agreement that undermined its case.[111] The court stated that while the party opposing enforcement urged fraud, the real complaint was that the party prevailing in the arbitration should have presented evidence favorable to its opponent's case.[112] The court rejected this argument, stating that "a party cannot complain about the nonproduction of evidence when it failed to offer such evidence itself."[113] In *Catz American Co. v. Pearl Grange Fruit Exchange Inc.*,[114] the party opposing enforcement did not ask the arbitrators to bring certain witnesses before the panel, although the prevailing party offered to make the witnesses available.[115] The panel never called for the witnesses' testimony.[116] The party opposing enforcement of the award argued that the prevailing party should nonetheless have produced the witnesses.[117] The court rejected this argument, stating that "[a]rbitrators must be given discretion to determine whether additional evidence is necessary or would simply prolong the proceedings."[118] Because the witnesses were not solely within the prevailing party's control and there was other evidence in the record supporting the other party's position, the court rejected the challenge to the

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111 *Id.* at 137.

112 *Id.* at 138.

113 *Id.*

114 292 F.Supp. 549 (S.D.N.Y.1968).

115 *Id.* at 553.

116 *Id.*

117 *Id.*

118 *Id.*

award.[119]

Pertamina argues that KBC's failure to reveal its political risk insurance policy amounts to misconduct warranting a refusal to enforce the Award. There is no evidence in the record that KBC deliberately misled the Tribunal. When the question of political risk insurance arose and was not clearly resolved, Pertamina had the opportunity to ask additional questions, which it chose not to pursue. The Tribunal gave Pertamina an opportunity to pursue discovery requests, which it declined. KBC's failure to produce evidence of political risk insurance, given Pertamina's decisions not to pursue the subject, does not violate public policy. The district court did not err in refusing to deny enforcement of the Award on the basis of a public policy violation or in refusing to grant a new trial on the basis of Rule 60(b).[120]

F. The Effect of the Indonesian Court's Annulment of the Arbitral Award

Pertamina filed an annulment action in the Central District Court of Jakarta, Indonesia in March 2002. That court annulled the Award on August 27, 2002. Pertamina now contends that the Indonesian court's annulment is a defense to enforcement under the New York Convention. KBC responds that Indonesia cannot be a proper forum for

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[119] *Id.*

[120] *Cf. Biotronik*, 415 F.Supp. at 138; *Catz American*, 292 F.Supp. at 553; *see Goel*, 274 F.3d at 999 (noting that the only issues on an appeal of a Rule 60(b) motion are the propriety of the denial of relief and whether the district court abused its discretion in denying relief).

annulment because Switzerland is the country of primary jurisdiction.

Pertamina argues that the New York Convention permits more than one country to have primary jurisdiction over an arbitration award. Pertamina contends that the Convention's language permitting annulment by a court in "the country in which, or under the law of which, that award was made" allows for two potential primary jurisdiction countries-the country who hosted the arbitration proceeding, and the country whose arbitral procedural law governed that proceeding.[121] Using this reasoning, Pertamina suggests that both Switzerland (the host country) and Indonesia (the country of governing law) have primary jurisdiction over the arbitration in this case.

Pertamina correctly observes that the Convention provides two tests for determining which country has primary jurisdiction over an arbitration award: a country in which an award is made, and a country under the law of which an award is made.[122] The New York Convention suggests the potential for more than one country of primary jurisdiction. Courts and scholars have noted as much.[123]

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[121] The language, " 'the competent authority of the country ... under the law of which, that award was made' refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law ... applied in the case." *Int'l Standard Elec. Corp.*, 745 F.Supp. at 178; *see Alghanim*, 126 F.3d at 21; *M & C Corp.*, 87 F.3d at 848.

[122] 9 U.S.C. § 201, Art. V(1)(e).

[123] *See, e.g., Int'l Standard Electric Corp.*, 745 F.Supp. at 177 (quoting Albert Jan van den Berg, *The New York Arbitration*

Pertamina cites one such scholar as support for its position:

> [A]mbiguity is derived from the fact that the formula does not indicate whether the party seeking the annulment of the award must choose between the court at the seat of the arbitration and the one located in the country under the law of which the award is made-if the two are distinct-or whether it may seek annulment jointly or alternatively before both courts.... Article V(1)(e) of the New York Convention could [ ] be construed as referring to the courts of only one country while giving the party seeking the annulment the possibility to choose between the two countries should the two be distinct.[124]

Although an arbitration agreement may make more than one country eligible for primary jurisdiction under the New York Convention, the predominant view is that the Convention permits only one in any given case.[125] "[M]any commentators and foreign courts have concluded that an action to

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Convention of 1958 350 (Kluwer 1981)); Paul Sanders, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 6 Netherlands Int'l L.Rev. 43, 56 (1956).

[124] Hamid G. Gharavi, *The International Effectiveness of the Annulment of An Arbitral Award* (2002).

[125] "The reality, however, seems to be that the Article V(1)(e) formula enables enforcement courts to refuse enforcement of an award annulled by the competent court of the country in which the award was made even if (i) the award was rendered pursuant to the laws of a third State and (ii) annulment proceedings were pending before the court of the country under the law of which the award was made." *Id.*

set aside an award can be brought *only* under the domestic law of the arbitral forum."[126] Pertamina's expert on international arbitration filed a report in the district court, stating that "there can be only one country in which the courts have jurisdiction over an annulment."[127] In its motion to the district court to set aside judgment under Rule 60(b), Pertamina conceded that "[a] primary jurisdiction has exclusive authority to nullify an award on the basis of its own arbitration law." Such "exclusive" primary

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[126] *Alghanim*, 126 F.3d at 22 (citing commentary that the country of origin of the award is the only country with primary jurisdiction).

[127] Supplemental Expert Report of Albert Jan van den Berg, p. 20. Others agree. Professor Paul Sanders concludes that regardless of any ambiguity, Article V(1)(e) grants primary jurisdiction to the courts of only a single country:

> [T]he suspension must have been ordered by or the application for suspension must have been made to a "competent authority of the country in which, or under the law of which, that award was made." Here only one competent authority is meant; either the Court of the country where the award was made, or the Court of the country under the law of which the award was made. These last words were added on a Russian proposal to cover the case that an award has been made f.i. in Germany under French procedural law. In that case the suspension ... according to the Convention should have to be demanded in France and not in Germany.

Sanders, *New York Convention* at 56. In his expert report for KBC, Professor Allen Scott Rau emphasized that "there is *only one national court system that has jurisdiction to consider an application for annulment of an award.*" Scholar Jan Paulsson submits "the fact is that setting aside awards under the New York Convention can take place only in the country in which the award was made." *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 Va. J. Int'l L. 211, 242 (1981).

jurisdiction in the courts of a single country is consistent with the New York Convention's purpose; facilitates the "orderliness and predictability" necessary to international commercial agreements; and implements the parties' choice of a neutral forum.[128]

In this case, both of the New York Convention criteria for the country with primary jurisdiction point to Switzerland-and only to Switzerland.[129] The Award was made in Switzerland and was made under Swiss procedural law. The parties' arbitration agreement designated Switzerland as the site for the arbitration. This designation presumptively designated Swiss procedural law as the *lex arbitri*, in

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[128] For example, "having a double test, *i.e.* that of the place of arbitration and that of the law governing the arbitration, can give rise to discrepancies." Andreas Bucher and Pierre-Yves Tschanz, *International Arbitration in Switzerland* 164 (1988). As one source has explained:

> For instance, the Federal Republic of Germany does not define German awards as awards made in Germany but as awards governed by German law wherever they are made. As a result, an award purporting to be made in Switzerland under German arbitration law is considered as a Swiss award in Switzerland and as a German award in Germany, with the result that such award could be challenged in both countries. In the reverse situation of an award made in Germany purportedly under Swiss arbitration law, such award is considered as Swiss in Germany and as German in Switzerland (since the place of arbitration is in Germany). As a result, such an award cannot be challenged in either country, but can only be recognized (or denied recognition) under the New York Convention.

Id.

[129] *See Alghanim*, 126 F.3d at 21; *M & C Corp.*, 87 F.3d at 848.

the absence of any express statement making another country's procedural law applicable.

Pertamina's own conduct during and after the arbitration evidences its intent to have Swiss procedural law apply and to have Switzerland be the country of primary jurisdiction over the Award. During the arbitration, Pertamina asserted that Swiss procedural law applied. When it lost the arbitration, Pertamina asked the Swiss court to set aside the Award, acknowledging that the Swiss courts had primary jurisdiction. While that appeal was pending, Pertamina urged the district court in the enforcement proceeding that the Swiss court had exclusive primary jurisdiction-until the Swiss courts rejected Pertamina's appeal.[130]

Under the New York Convention, the parties' arbitration agreement, and this record, Switzerland had primary jurisdiction over the Award.[131] Because Indonesia did not have primary jurisdiction to set aside the Award, this court affirms the district court's conclusion that the Indonesian court's annulment ruling is not a defense to enforcement under the New York Convention.

III. Conclusion

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[130] The district court found that Pertamina "specifically, repeatedly and unequivocally" argued that Swiss arbitration law applied in the arbitration. *See* note 24.

[131] The Hong Kong court enforced the Award after the Indonesian court issued its annulment ruling, stating that "the fact that the court in Indonesia has now annulled the award under its own law is also a matter which has no effect on this court's task." *Hong Kong decision* at 12.

Pertamina's challenges to the district court's decision affirming the Award are without merit. The summary judgment enforcing the Award is AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KARAHA BODAS COMPANY, L.L.C., *Plaintiff-Appellee*,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA; ET AL., *Defendants*,

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA, *Defendant-Appellant*.

No. 02-20550

June 18, 2003

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Matthew D. Slater (argued), Charles Frederick Lettow, Janie A. Chuang, William Sullivan Fultz, Cleary, Gottlieb, Steen & Hamilton, Washington, DC, F. Walter Conrad, Jr., Michael L. Brem, Baker Botts, Houston, TX, for Defendant-Appellant.

Carolyn B. Lamm, White & Case, Washington, DC,

John E. O'Neill, Clements, O'Neill, Pierce, Wilson & Fulkerson, Houston, TX, for Republic of Indonesia, Amicus Curiae.

Appeal from the United States District Court for the Southern District of Texas.

Before WIENER and STEWART, Circuit Judges, and RESTANI, Judge.*

WIENER, Circuit Judge:

Defendant-Appellant Perusahaan Pertam-bangan Minyak Dan Gas Bumi Negara ("Pertamina") appeals the district court's preliminary injunction prohibiting it from prosecuting an action it instituted in Indonesia (1) to annul a Swiss arbitration award (the "Award") to Appellee, Karaha Bodas Company, L.L.C. ("KBC") and (2) to enjoin KBC from taking steps to enforce the Award.[1] In addition, Pertamina

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* Judge of the U.S. Court of International Trade, sitting by designation.

[1] In a separate challenge, Pertamina has appealed the district court's judgment enforcing the arbitral award. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 190 F.Supp.2d 936 (S.D.Tex.2001). KBC moved to consolidate oral argument on enforcement of the Award with the appeal here on the preliminary injunction but that motion was denied. Order dated September 5th, 2002. In March, 2003, the panel addressing enforcement remanded the case for consideration of Pertamina's Rule 60(b) motion, and in April, 2003, the district court denied in part Pertamina's motion. In addition to the enforcement judgment itself, there are subsequent similar injunctions issued by the district court that are not before us. *See, e.g.,* July 22, 2002 Order (requiring Pertamina to unequivocally and strenuously request that the

challenges the district court's order holding it in contempt for continuing to pursue the Indonesian action in violation of the court's initial temporary restraining order ("TRO").[2] Given the structure and purpose of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or the "Convention"),[3] and the responsibilities of the United States under that treaty, we conclude that the district court abused its discretion[4] in granting the preliminary injunction in favor of KBC, requiring that we vacate that injunction and, to the extent

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Indonesian court postpone proceedings); July 3, 2002 Order (enjoining Pertamina from taking substantive steps in furtherance of annulment). KBC also has filed a second motion for contempt on grounds that Pertamina has not complied with any of the court's orders, including the preliminary injunction on appeal here. KBC's Amended Second Motion for Contempt, June 11, 2002.

[2] When the court issued its preliminary injunction order, it expressly stated that both its TRO and its contempt order were superceded by this injunction, but folded many of the substantive provisions of those orders into the injunction. Nevertheless, both Pertamina and KBC separately address the validity of the contempt order. For a more complete explanation of the status of the contempt order on appeal, *see infra* Part II.D.

[3] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter "New York Convention"], June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force with respect to the United States, Dec. 29, 1970), *codified at* 9 U.S.C. § 201 *et seq.*

[4] *See United States v. Logan*, 861 F.2d 859, 866 n. 5 (5th Cir.1988) ("abuse of discretion is a phrase which sounds worse than it really is; it is simply a legal term of art which carries no pejorative connotations of a professional or personal nature") (citation and internal quotation marks omitted).

necessary, the district court's order holding Pertamina in contempt.

I. FACTS AND PROCEEDINGS

The origins of this dispute lie in two contracts to construct a power plant in Indonesia. Pertamina is an oil, gas, and geothermal energy company that is wholly owned by the Government of Indonesia ("GOI"). KBC is a Cayman Islands limited liability private power development company established to develop geothermal resources, including the construction and operation of electric power generating facilities.[5] In November 1994, KBC entered into two contracts with Pertamina to develop the Karaha-Bodas Geothermal Project (the "Project"), which included the building of a geothermal power plant in West Java, Indonesia. Under the first agreement, the Joint Operation Contract ("JOC"), KBC contracted with Pertamina to develop geothermal energy resources from two geothermal fields in Indonesia. In the second agreement, the Energy Sales Contract ("ESC"), KBC, Pertamina, and Pt. PLN (Persero) ("PLN"), an electric company wholly owned by the GOI,[6] agreed that Pertamina would sell the KBC-produced electricity to PLN.

In 1997, the Indonesian economy suffered during

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[5] The principal investors in KBC are two energy companies: Caithness Energy, L.L.C. ("Caithness") and FPL Energy, L.L.C. ("FPL").

[6] PLN, a party to the ESC agreement, was a respondent at the arbitration, and was originally named a respondent in the action before the district court, but was not served and has been voluntarily dismissed from the case by KBC.

the Asian financial crisis. In January 1998, after a brief suspension and a temporary restoration of the Project, the President of Indonesia issued a decree suspending the Project indefinitely as part of a national effort to stabilize the Indonesian economy. KBC declared *force majeure* and ceased performance under the contracts.

The contracts contained almost identical comprehensive consultation and arbitration clauses which required the parties to arbitrate any disputes in Switzerland pursuant to the Arbitral Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"). In April 1998, KBC initiated arbitration proceedings in Switzerland, claiming that Pertamina had breached the contracts. Pertamina opposed arbitration on various grounds, which included a challenge to the composition of the arbitration panel. The panel rejected those objections and proceeded to conduct a hearing on the merits in June 2000. In December 2000, the panel ruled that Pertamina and PLN had breached the contracts and awarded damages to KBC exceeding $260 million.[7]

In February 2001, Pertamina appealed the Award to the Supreme Court of Switzerland. While that appeal was pending, KBC initiated the instant proceedings in federal district court to enforce the Award. Pertamina responded by challenging enforcement on four grounds under Article V of the

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[7] The arbitration panel awarded KBC (1) $111.1 million in damages for lost expenditures; (2) $150 million in damages for loss of profits; (3) $66,655 for costs and expenses of the final phase of arbitration; and (4) 4% post-judgment interest.

New York Convention: (1) The arbitration panel was improperly composed (Article V(1)(d)); (2) the arbitration procedures were not otherwise in accordance with the agreement (Article (V)(1)(d)); (3) Pertamina was deprived of its right to present its case (Article V(1)(b)); and (4) the arbitral award violated United States public policy (Article V(2)(b)).[8] The district court denied Pertamina's motion to stay pending its appeal to the Supreme Court of Switzerland and directed the parties to proceed with summary judgment briefing. The court acknowledged, however, that it slowed the proceedings in deference Pertamina's request. The Swiss court eventually dismissed Pertamina's appeal on procedural grounds and denied its motion for reconsideration.[9] In December 2001, the district court granted KBC's motion for summary judgment (the "Judgment") to enforce the Award.

Pertamina appealed the Judgment but declined to post a supersedeas bond. In January 2002, the district court entered an order allowing KBC to commence execution of the Judgment, and the following month that court granted KBC leave to register the Judgment in New York, Delaware, and California. KBC also brought actions under the Convention in Hong Kong, Canada, and Singapore to enforce the Award in those jurisdictions.

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[8] *See* New York Convention, art. V.

[9] In April 2001, the Swiss Supreme Court dismissed Pertamina's claim because of untimely payment of costs. Pertamina moved for reconsideration, arguing that the late payment was the result of circumstances beyond Pertamina's control. In August 2001, the Swiss Federal Tribunal denied Pertamina's request for reconsideration.

In March 2002, Pertamina filed an application in the Central District Court of Jakarta to annul the Award (the "Indonesian annulment action"). Pertamina also sought an Indonesian injunction and penalties to prevent KBC from seeking to enforce the Award (the "Indonesian injunction"). The Indonesian court scheduled a proceeding for 10:00 a.m. on Monday April 1, 2002 to hear argument on the proposed injunction. In advance of the Indonesian hearing, however, KBC filed a motion in the district court on Friday, March 29, 2002, for a temporary restraining order to enjoin Pertamina from seeking injunctive relief in Indonesia. In a telephonic hearing that same evening,[10] the court determined that KBC would suffer irreparable harm if the Indonesian court issued an injunction to prevent KBC from "enforcing or executing" the Judgment. The district court orally ordered Pertamina to withdraw its application for injunctive relief at or before the hearing in the Indonesian court and to take no substantive steps in that court. The district court did not, however, prohibit Pertamina from proceeding in Indonesia entirely; rather, it prohibited Pertamina from taking any substantive steps (e.g., submitting legal arguments) but permitted Pertamina to take any ministerial steps necessary to maintain the cause of action. The court subsequently explained that it issued the TRO (1) to preserve the integrity of its judgment, which had become final and was on appeal to us without bond, and (2) to maintain the

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[10] March 29, 2002, was a legal holiday in Indonesia (Good Friday). Jakarta is 13 hours ahead of Houston (Central Standard Time). Counsel for Pertamina participated by phone.

parties' positions as they stood prior to Pertamina's initiation of the Indonesian annulment action.

Claiming that it lacked sufficient time to do so, Pertamina did not withdraw its request for injunctive relief, and the Indonesian court issued a provisional injunction prohibiting KBC from seeking to enforce the Award. Later that day, Pertamina's president-director issued a statement to the effect that Pertamina would not attempt to enforce the Indonesian court's order with respect to KBC's enforcement actions in the United States.

KBC immediately filed a motion in the district court to hold Pertamina in contempt of the TRO. Agreeing with KBC, the district court (1) again ordered Pertamina to withdraw its Indonesian application for injunctive relief against KBC, (2) found Pertamina in contempt of the TRO, and (3) ordered Pertamina to indemnify KBC for any fines resulting from the Indonesian injunction.[11] Pertamina notified the Indonesian court of the district court's order but did not request that the Indonesian court vacate or suspend its injunction as directed by the district court.

KBC next filed a motion in the district court for a preliminary injunction to prohibit Pertamina from further pursuing the Indonesian injunction and the

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[11] The district court actually issued two indemnification-like orders. It ordered Pertamina to indemnify KBC for any monetary penalties imposed by the Indonesian court, and it ordered Pertamina to pay KBC for monetary penalties imposed by any other court on the basis of the Indonesian injunction, before such payment is due.

Indonesian annulment action. In response, Pertamina filed a motion to purge the contempt order on the ground that the statement by Pertamina's president was sufficient to establish substantial compliance with the TRO. In subsequently granting KBC's motion, the district court issued seven orders: (1) It enjoined Pertamina from enforcing the Indonesian injunction; (2) it enjoined Pertamina from collecting any fine or penalty from KBC as a result of this injunction; (3) it extended the indemnification aspects of its earlier contempt order;[12] (4) it enjoined Pertamina from taking any substantive steps to prosecute the Indonesian annulment action; (5) it ordered Pertamina to advise the Indonesian court that Pertamina cannot and will not take any action to pursue the Indonesian annulment action; (6) it dissolved the provisions of the TRO and contempt order to the extent those orders differed with the preliminary injunction; and (7) it denied Pertamina's motion to purge contempt.

On May 7, 2002, Pertamina informed the Indonesian court of the district court's preliminary injunction and, pursuant to that injunction, requested the Indonesian court to suspend the proceedings indefinitely. A week later, the Indonesia court rejected Pertamina's request to suspend the litigation, in part because PLN, which was also a party to the Indonesian litigation, filed an objection to postponement, and in part because the court

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[12] The indemnification provisions of the contempt order were restated in the preliminary injunction. Although we may discuss the indemnification on its own terms, by vacating the preliminary injunction order today, we also vacate the indemnification provisions of this order.

concluded that it retained the authority to adjudicate the case.

Pertamina timely filed its notice of appeal to this court. In May 2002, we denied Pertamina's emergency motion for a partial stay of the district court's preliminary injunction. On August 27, 2002, while the matter was still under our review, the Central Jakarta District Court concluded that it had primary jurisdiction under the New York Convention and annulled the Award on grounds that it was contrary to the Convention and Indonesian arbitration law. The Indonesian court also permanently enjoined KBC from seeking to enforce the Award and imposed a fine of $500,000 for each day that KBC violated the Indonesian injunction.

In March 2003, the High Court of the Hong Kong Special Administrative Region Court of First Instance issued an order enforcing the Award in Hong Kong. Subsequently, the district court addressed Pertamina's Rule 60(b) motion to set aside judgement pursuant to our remand. The court reaffirmed its summary judgment in favor of KBC, concluding again that under the Convention the courts of Indonesia are not competent to annul the Award.

In this appeal, Pertamina argues that the district court lacked authority to issue the preliminary injunction and, in the alternative, that the court abused its discretion by doing so. Pertamina also appeals the district court's contempt order, again arguing that the district court lacked authority to enjoin Pertamina from proceeding in Indonesia and,

in the alternative, that Pertamina substantially complied with the order.[13]

II. ANALYSIS

A. STANDARD OF REVIEW

We review a district court's grant of a preliminary injunction for abuse of discretion.[14] Even though "the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed *de novo*."[15]

Generally, four requirements must be met to obtain a preliminary injunction:

> (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the

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[13] Pertamina advances the argument as well that the district court, in issuing the preliminary injunction, committed reversible error by failing to require KBC to post security to cover damages incurred by Pertamina if the injunction is found to have been improvidently granted. As we decide this case on other grounds, we need not address this argument.

[14] *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir.1985).

[15] *Women's Med. Ctr. v. Bell*, 248 F.3d 411, 419 (5th Cir.2001).

public interest.[16]

We have cautioned, however, that a preliminary injunction is "an extraordinary remedy" which should only be granted if the party seeking the injunction has "clearly carried the burden of persuasion" on all four requirements.[17] As a result, "[t]he decision to grant a preliminary injunction is to be treated as the exception rather than the rule."[18]

The dispute at issue here concerns the district court's decision to issue a foreign antisuit injunction, a particular subspecies of preliminary injunction. Although both the district court and the parties discussed all four prerequisites to the issuance of a traditional preliminary injunction, the suitability of such relief ultimately depends on considerations unique to antisuit injunctions.[19] As we conclude that the district court abused its discretion in granting the instant antisuit injunction, we need not address all the factors that generally are prerequisites to obtaining a preliminary injunction.

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[16] *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974) (citations omitted).

[17] *Mississippi Power & Light Co.*, 760 F.2d at 621.

[18] *Id.*

[19] To the extent the traditional preliminary injunction test is appropriate, therefore, we only need address whether KBC showed a significant likelihood of success on the merits. The merits in this case, however, are not about whether Indonesia is an appropriate forum to litigate an annulment action, but instead whether KBC has demonstrated that the factors specific to an antisuit injunction weigh in favor of granting that injunction here.

Finally, the district court's determination of its jurisdiction to enjoin Pertamina is an issue that we review *de novo*.[20] Still, we review the district court's order holding Pertamina in contempt, to the extent it still exists, only for abuse of discretion.[21]

B. THRESHOLD MATTERS

1. *Jurisdiction*

As an initial matter, Pertamina argues that the New York Convention divests the district court of authority to enjoin a party from proceeding in a court of *primary* jurisdiction (here, Indonesia, at least according to Pertamina). The New York Convention governs the confirmation and enforcement of the Award and "mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought."[22] Under the Convention, "the country in which, or under the [arbitration] law of which, [an] award was made" is said to have *primary* jurisdiction over the arbitration award.[23] All other signatory States are *secondary* jurisdictions, in which parties can only contest whether that State should enforce the arbitral award. The limitation of being a court of secondary jurisdiction, Pertamina contends, also deprives the

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[20] *United States v. Lynch*, 114 F.3d 61, 63 (5th Cir.1997).

[21] *F.D.I.C. v. LeGrand*, 43 F.3d 163, 166 (5th Cir.1995).

[22] *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2nd Cir.1997).

[23] New York Convention, art. V(1)(e).

district court of the competence to issue injunctive relief here.

It is well established, however, that normally "federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign suits."[24] Moreover, "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."[25] Under the New York Convention and Chapter 2 of the Federal Arbitration Act (the Convention's implementing legislation) federal courts maintain jurisdiction to hear cases like this.[26] Although these treaty obligations limit the grounds on which the court can refuse to enforce a foreign arbitral award, there is nothing in the Convention or implementing legislation that expressly limits the inherent authority of a federal court to grant injunctive relief with respect to a party over whom it has jurisdiction. Given the absence of an express provision, we discern

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[24] *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir.1996); *see also Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1352 (6th Cir.1992); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2nd Cir.1987); *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 926 (D.C.Cir.1984); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855 (9th Cir.1981).

[25] *Califano v. Yamasaki*, 442 U.S. 682, 705, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) (*citing Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946); *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9-11, 62 S.Ct. 875, 86 L.Ed. 1229 (1942)).

[26] 9 U.S.C. § 203 (providing that a "proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States").

no authority for holding that the New York Convention divests the district court of its inherent authority to issue an antisuit injunction.[27]

2. *Mootness*

Guided by the constitutional command in Article III that our power extends only to actual cases or controversies, we require that an actual controversy exist at every stage in the judicial process.[28] Federal courts "may not give opinions upon moot questions or abstract propositions."[29] Thus, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed."[30] We have similarly recognized that "[a] claim becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome."[31]

KBC contends that Pertamina's appeal of the district court's April 26, 2002 preliminary injunction

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[27] We need not, and thus do not, resolve the issue whether a set of circumstances might exist under which a secondary enforcement court under the New York Convention would be justified in imposing an antisuit injunction.

[28] *In re Taylor*, 916 F.2d 1027, 1028 (5th Cir.1990).

[29] *Calderon v. Moore*, 518 U.S. 149, 150, 116 S.Ct. 2066, 135 L.Ed.2d 453 (1996) (*quoting Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895)).

[30] *See Church of Scientology v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (citation and internal quotation marks omitted).

[31] *Piggly Wiggly Clarksville, Inc. v. Mrs. Baird's Bakeries*, 177 F.3d 380, 383 (5th Cir.1999).

is moot because the Indonesian court granted the annulment and injunctive relief that KBC sought to prevent. We have recognized, however, that "the collateral consequences doctrine serves to prevent mootness when the violation in question may cause continuing harm and the court is capable of preventing such harm."[32] Thus, as long as there is some interest in the outcome for which effective relief is available, the case is not moot.[33]

In this case, even though KBC may not have been successful in avoiding the Indonesian court's annulment and injunction, there are aspects of both the Indonesian court's injunction and the district court's injunction that potentially could affect both parties to this dispute. When the preliminary injunction superseded and subsumed the TRO and the contempt order, it prohibited Pertamina from substantively pursuing annulment in Indonesia and from collecting any fines associated with the Indonesian injunction, and it ordered Pertamina to indemnify KBC for any penalties arising from the Indonesian injunction. Although the district court's efforts to keep Pertamina from securing an injunction in Indonesia may be moot, other aspects of the district court's preliminary injunction, particularly the portion of that order requiring indemnification, continue to give Pertamina a concrete interest in this dispute.[34] Similarly, KBC is

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[32] *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir.1998)

[33] *See id.*

[34] In addition, a second contempt motion is presently pending before the district court, this one relating to Pertamina's alleged

still potentially subject to both the fines and the penalties imposed by the Indonesian court, and therefore maintains an interest in affirming the indemnification aspects of the district court's preliminary injunction order. For these reasons, we hold that Pertamina's appeal of the preliminary injunction is not moot.

C. ANTISUIT INJUNCTION

When a preliminary injunction takes the form of a foreign antisuit injunction, we are required to balance domestic judicial interests against concerns of international comity. In assessing whether an injunction is necessary, we weigh the need to "prevent vexatious or oppressive litigation"[35] and to "protect the court's jurisdiction"[36] against the need to defer to principles of international comity. We have noted, however, that notions of comity do not wholly dominate our analysis to the exclusion of these other concerns.[37]

1. *Vexatiousness and Oppressiveness of Foreign Litigation*

In determining whether proceedings in another

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violation of this preliminary injunction and other subsequent orders enjoining Pertamina from taking substantive steps in the Indonesian action. The district court has indicated that it will not rule on the second contempt motion until we rule on the propriety of the preliminary injunction.

[35] *Kaepa, Inc.*, 76 F.3d at 627.

[36] *MacPhail v. Oceaneering Int'l, Inc.*, 302 F.3d 274, 277 (5th Cir.2002).

[37] *Kaepa, Inc.*, 76 F.3d at 627.

forum constitute vexatious or oppressive litigation, we have looked for the presence of several interrelated factors, including (1) "inequitable hardship" resulting from the foreign suit;[38] (2) the foreign suit's ability to "frustrate and delay the speedy and efficient determination of the cause";[39] and (3) the extent to which the foreign suit is duplicitous of the litigation in the United States.[40]

The district court concluded, and on appeal KBC continues to contend, that Indonesia is not a proper forum for an annulment action under the New York Convention, irrespective of Pertamina's apparently self-serving argument that Indonesia is a "primary" jurisdiction. To resolve the instant dispute, however, it is not necessary for us to address the Indonesian court's decision to issue its own injunction and to entertain an annulment action under the Convention. Several structural aspects of the New York Convention indicate that none of the factors that usually contribute to vexatiousness and oppressiveness are at play here.

When the Convention was drafted, one of its main purposes was to facilitate the enforcement of arbitration awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs.[41] Under the Convention, a court

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38 *Id.* (citation omitted).

39 *Id.* (citation and internal quotation marks omitted).

40 *MacPhail*, 302 F.3d at 277.

41 *See* Albert Jan van den Berg, *The New York Arbitration*

maintains the discretion to enforce an arbitral award even when nullification proceedings are occurring in the country where the award was rendered.[42] Furthermore, an American court and courts of other countries have enforced awards, or permitted their enforcement, despite prior annulment in courts of primary jurisdiction.[43] Here, KBC was able to

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Convention of 1958: Toward a Uniform Judicial Interpretation, at 7, 9 (1981). The antecedent Geneva Convention required an award to be final in the country were it was made before enforcement was possible in a third country, which was interpreted to mean that a court of the country of origin had to give leave to allow enforcement (also called the "double exequatur" problem). Van den Berg, at 7. The New York Convention resolved this problem by only requiring rewards to be "binding" on the parties rather than "final" in order for enforcement to occur in a court of secondary jurisdiction. *Id.* at 9; *Alghanim*, 126 F.3d at 22 (recognizing the New York Convention's change in no longer requiring recognition in the rendering state before enforcement in a court of secondary jurisdiction was possible).

[42] Article VI grants an enforcement court discretion to enforce an award even though annulment proceedings may be taking place elsewhere. New York Convention, art. VI (providing that an enforcement court "may, if it considers it proper" stay its enforcement proceedings while an annulment action takes place elsewhere). *See* Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1071 (1961) (explaining that as a "reasonable complement to Article V(1)(e)" Article VI is "wholly discretionary, and the enforcing State is free to refuse adjournment and to enforce the award, nullification proceedings in the rendering State notwithstanding").

[43] *See Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F.Supp. 907, 909-13 (D.D.C.1996) (enforcing an arbitral award made in Egypt despite annulment of the award by Egyptian courts, in part because Article V only makes refusal to enforce discretionary, and in part because Article VII enables a

initiate proceedings in a secondary jurisdiction (the United States) to enforce the Award before a court of primary jurisdiction (Switzerland) had ruled on Pertamina's appeal of the Award.

By allowing concurrent enforcement and annulment actions, as well as simultaneous enforcement actions in third countries, the Convention necessarily envisions multiple proceedings that address the same substantive challenges to an arbitral award. For instance, Article (V)(1)(d) enables a losing party to challenge enforcement on the grounds that the arbitral panel did not obey the law of the arbitral situs, i.e., the *lex arbitri,* even though such a claim would undoubtedly be raised in annulment proceedings in the rendering State itself. In addition, this case illustrates that enforcement proceedings in multiple secondary-jurisdiction states can address the same substantive issues. As noted, in addition to the U.S. proceeding, KBC has initiated enforcement actions in Canada and Singapore, and has already secured enforcement in Hong Kong. Although KBC contends that other courts will give *res judicata* effect to U.S. enforcement, the recent decision of the High Court of the Hong Kong Special Administrative Region Court of First Instance demonstrates that other enforcement courts can and sometimes do conduct

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secondary jurisdiction to enforce an award if allowed by its domestic law). *See also* Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958,* at 169-70 (2001) (discussing a court's discretion to enforce an award despite annulment elsewhere and listing several examples of the exercise of such discretion in other national courts).

their own independent analyses of substantive challenges to the enforcement of the foreign award.[44] In short, multiple judicial proceedings on the same legal issues are characteristic of the confirmation and enforcement of international arbitral awards under the Convention.

Another important aspect of the New York Convention is its assigning of different roles to national courts to carry out the aims of the treaty. Articles IV and V of the Convention specify the procedures for courts of secondary jurisdictions to follow when deciding whether to enforce a foreign arbitral award. Article IV provides that a party can obtain enforcement of its award by furnishing to the putative enforcement court the authenticated award and the original arbitration agreement (or a certified copy of both).[45] Article V, in turn, enumerates specific grounds on which the court *may* refuse enforcement if the party contesting enforcement provides proof sufficient to meet one of the bases for refusal.[46]

In contrast to the limited authority of secondary-jurisdiction courts to review the arbitral award, courts of primary jurisdiction, usually the courts of the country of the arbitral situs, have much broader discretion to set aside an award. By its silence on the

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[44] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* (High Court of the Hong Kong Special Administrative Region Court of First Instance, March 27, 2003) [hereinafter "Hong Kong decision"].

[45] New York Convention, art. IV(1).

[46] Art. V.

matter, the Convention does not restrict the grounds on which primary-jurisdiction courts may annul an award, thereby leaving to a primary jurisdiction's local law the decision whether to set aside an award.[47] Consequently, even though courts of a *primary* jurisdiction may apply their own domestic law when evaluating an attempt to annul or set aside an arbitral award, courts in countries of *secondary* jurisdiction may refuse enforcement only on the limited grounds specified in Article V.[48]

When we take into consideration these features of the New York Convention, we see that none of the factors that support antisuit injunctions are strong here. First, as the Convention already provides for multiple simultaneous proceedings, it is difficult to envision how court proceedings in Indonesia could amount to an inequitable hardship. Not only did KBC contract to arbitrate its dispute in a foreign country (Switzerland), but it also instituted enforcement proceedings in several countries, including the United States. Indeed, but for

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[47] Di Pietro, at 169 (explaining that by failing to restrict the grounds for setting aside an award in the rendering State, the Convention left the matter to that State's domestic law, a problem described as the "anathema of local particularities"); Quigley, at 1070 (explaining that one reason the Convention failed to establish grounds for annulment in a rendering State is that it would have been considered "meddling with national procedure for handling domestic awards").

[48] *Alghanim*, 126 F.3d at 23. As described *infra*, however, enforcement courts do maintain discretion to enforce an award despite annulment elsewhere. Furthermore, although a primary jurisdiction maintains more bases on which to set aside an award, several likely track the grounds provided for in Article V.

Pertamina's initiation of a law suit in Indonesia, or perceived bias there, KBC conceivably might have attempted enforcement there as well.

It is also uncertain whether the financial hardship about which KBC complains will ever materialize. The Indonesian injunction imposes fines of $500,000 per day on KBC for as long as it pursues enforcement of the award. In challenging the contempt order in district court, however, Pertamina indicated, based on advice from Indonesian counsel, that the injunction is unenforceable until Pertamina seeks permission from a higher Indonesian court to enforce it; and Pertamina has promised the district court that it will not pursue enforcement of the Indonesia injunction. Even if Pertamina were to initiate proceedings to enforce this financial penalty, and the Indonesian court were to fine KBC for its enforcement efforts *outside* of Indonesia,[49] it is anything but clear that this would cause KBC financial hardship: There is no record evidence that KBC has substantial assets in Indonesia.

Although it is always possible for Pertamina to pursue enforcement of the fines in third countries, it seems extremely unlikely that any country would countenance such a claim, given Pertamina's dubious

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[49] Pertamina has also introduced into the record its Indonesian legal counsel's opinion that the Indonesian court injunction only concerns KBC's attempts to enforce the arbitral award in Indonesia, not its actions elsewhere in the world, because as a general rule injunctions issued by Indonesian court do not have extraterritorial effect.

behavior throughout this process.[50] Furthermore, even if KBC should have substantial assets in Indonesia, it is arguable that Pertamina would have found another reason to convince Indonesian courts to seize those assets. Pertamina could have sought monetary relief in the Indonesian courts regardless of the basis for KBC's claims elsewhere, and Indonesian courts, if truly determined to protect Pertamina at any cost, likely would have been willing to grant the relief requested. Nevertheless, as a court of secondary jurisdiction under the New York Convention, charged only with enforcing or refusing to enforce a foreign arbitral award, it is not the district court's burden or ours to protect KBC from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it.

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[50] When KBC first attempted to enforce its award in the district court, Pertamina requested that the district court stay the proceedings pending the outcome of Swiss court proceedings. In making this request, as well as in other submissions to the district court, Pertamina continuously represented to the district court that Swiss arbitral law governed the arbitration. Indeed, the district court admitted that it partially relied on these representations when it slowed the enforcement proceedings. Pertamina also apparently made similar representations to the arbitral panel itself. Only after Swiss courts had dismissed Pertamina's appeals, and the district court enforced the award in favor of KBC, did Pertamina file suit in Indonesian court. Regardless of its reasons for the delay, its complete silence as to its ability to file in Indonesian court (based on the applicability of Indonesian arbitral law) throughout the span of litigation, is certainly sufficient grounds to find Pertamina's behavior dubious and somewhat deceptive. Whether or not the Indonesian court is a proper forum, Pertamina implied more than once that Swiss law was the applicable arbitral law in this dispute.

Second, there is little evidence that the Indonesian injunction or annulment action will "frustrate and delay the speedy and efficient determination of the cause."[51] Although it may occasion some temporary delay, an Indonesian annulment is wholly ineffective in curtailing the ability of any court of secondary jurisdiction, including U.S. courts, to enforce the arbitral award. As an enforcement jurisdiction, our courts have discretion under the Convention to enforce an award despite annulment in another country, and have exercised that discretion in the past.[52] The discretion to enforce in this case is even more well-founded, as a Swiss court with indisputable primary jurisdiction under the Convention has already dismissed Pertamina's challenge to the Award. Furthermore, even though an Indonesian annulment may force secondary-jurisdiction courts to consider that judgment in deciding whether to enforce the Award, they nonetheless must undertake an enforcement analysis. This slight additional expenditure of judicial resources seems inconsequential, as annulment is only one of several grounds on which recognition and enforcement may be refused;[53] and

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[51] *Kaepa, Inc.*, 76 F.3d at 627 (citation and internal quotation marks omitted).

[52] *Chromalloy Aeroservices*, 939 F.Supp. 907.

[53] *See* New York Convention, art. V(1) (other bases for refusing enforcement include, *inter alia*, that (1) the parties were under some incapacity, or the agreement was not valid under the arbitral law chosen by the parties or the law of the country where the award was made; (2) the party against whom the award is invoked was given insufficient notice of the arbitration proceedings or was unable to present his case; (3)

some of these grounds have already been raised by Pertamina in the district court as well as in the enforcement proceeding in Hong Kong.[54]

Third, the duplication inherent in the Indonesian proceedings is less problematic than it might be otherwise, as the Convention already allows for multiple proceedings addressing the same or similar legal bases against enforcement and confirmation. Additionally, to any extent that the Indonesian courts might be acting as legitimate courts of primary jurisdiction, such courts would have domestic law grounds on which to analyze the propriety of a foreign arbitral award, but which, under the Convention, may not be relied on by enforcement courts in other States. Thus, assuming *arguendo* that the Indonesian courts might somehow be deemed to be courts of primary jurisdiction, they still would not precisely duplicate the enforcement proceedings that took place in the United States.

Finally, the Indonesian court proceedings do not threaten the integrity of the district court's jurisdiction or its Judgment enforcing the Award. As courts of secondary jurisdiction here, the authority of

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the award contains decisions on matters that go beyond the scope of the submission to arbitration; and (4) the composition of the arbitral authority or the arbitral procedure violated the agreement of the parties or the law of the country where the arbitration took place). Even though many of these reasons may have no basis of fact in this dispute, they nonetheless constitute arguments that an enforcement court may very well have to confront in its proceedings.

[54] *Karaha Bodas Co.*, 190 F.Supp.2d at 945-957; *Hong Kong Decision*, (High Court of the Hong Kong Special Administrative Region Court of First Instance, March 27, 2003).

U.S. courts is restricted to enforcing or refusing to enforce the arbitral award under the Convention. The district court has chosen to enforce the Award, and the Indonesian annulment only has an effect here to the extent that our courts chose to recognize it. Thus, the integrity of our jurisdiction and the district court's judgment will not be affected unless we decide that the Indonesian annulment is in fact valid *and* that this annulment outweighs the Swiss court's confirmation of the Award. Otherwise, under the Convention, we maintain the discretionary authority to ignore the Indonesian proceedings and affirm the district court's decision to enforce the Award here. Furthermore, the integrity of the district court's decision vis-à-vis other secondary enforcement jurisdictions is not harmed, as these courts are prone to conduct their own independent enforcement analyses anyway. Hong Kong's recent decision to enforce the Award not only supports this conclusion, but also illustrates that an Indonesian court's annulment fails to jeopardize enforcement of the Award elsewhere as well.[55]

2. *Interests in International Comity*

Balanced against the scant vexatiousness and oppressiveness of Pertamina's acts are the not-insubstantial interests in preserving international comity. Neither a matter of legal obligation nor of mere courtesy, comity has long counseled courts to give effect, whenever possible, to the executive,

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[55] *See Hong Kong decision* (stating that "the fact that the court in Indonesia has now annulled the award under its own law is also a matter which has no effect on this court's task").

legislative and judicial acts of a foreign sovereign so as to strengthen international cooperation.[56] The doctrine of comity contains a rule of "local restraint" which guides courts reasonably to restrict the extraterritorial application of sovereign power.[57] In this vein, we have impliedly recognized the importance of comity when a case implicates public international issues and when prior steps in resolving a dispute have taken place in international fora.[58] The immediate issue in this case is whether an injunction, which effectively attempts to arrest the judicial proceedings of another foreign sovereign-here, Indonesia-sufficiently upsets our interests in preserving comity among nations.

The district court concluded that its injunction did not "impinge on another court's jurisdiction or

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[56] *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 40 L.Ed. 95 (1895) (describing comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws").

[57] Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int'l L. 280, 281 (1982). *See also Restatement (Third) of Foreign Relations*, § 403, rptr's n. 2 (1987) (stating that courts have invoked "comity" in "approaching challenges to the reach of United States jurisdiction to prescribe").

[58] *See Kaepa, Inc.*, 76 F.3d at 627 (finding no threat to interstate relations, and thus no need to defer to notions of comity, when "no public international issue is implicated," and when "the dispute has been long and firmly ensconced within the confines of the United States judicial system").

cause comity concerns," because it had already issued a final judgment, thereby minimizing the reason to defer to proceedings elsewhere, and because Indonesia was not a proper court of primary jurisdiction under the Convention. The district court reasoned that, in fact, it was the Indonesian action that upset comity by permitting the relitigation of issues already decided by the district court, thereby threatening to erode the effectiveness of the district court's judgment, both here and abroad.

We agree that there is strong evidence in this instance favoring Switzerland as the paramount country of primary jurisdiction under the Convention. The district court and the Hong Kong Court of First Instance suggest at least three potential bases for finding that Swiss law effectively constitutes the *lex arbitri* of this case: (1) Pertamina previously argued in favor of Swiss arbitral law, which may reveal the parties' original contractual intentions to apply Swiss law in arbitration; (2) the parties failed clearly to choose Indonesian arbitral law in their agreement, as may be required by international law when parties want to select an arbitral law other than that of the arbitral situs; and, finally, (3) Pertamina may be judicially estopped from arguing otherwise because it contended strenuously in the district court, proffering arguments on which the court relied, that Swiss arbitral law applies to this dispute. Whether Switzerland is the only country of primary jurisdiction (and, impliedly, whether Indonesia could be a proper forum for annulment), however, is an issue that is not directly before us today. That issue arises under Article V of the Convention as a defense

to enforcement, which the district court decided earlier, and which was on separate appeal before another panel of this Court and thereafter before the district court on remand.

Nevertheless, even if the Indonesian court acted wrongly in its decision to annul the Award as a purported court of primary jurisdiction under the New York Convention, we need not directly address the propriety of that court's injunction and annulment. Contrary to the district court's conclusions, legal action in Indonesia, regardless of its legitimacy, does not interfere with the ability of U.S. courts, or courts of any other enforcement jurisdictions for that matter, to enforce a foreign arbitral award. Furthermore, as we have explained, the "relitigation" of issues is characteristic of the Convention's confirmation and enforcement scheme. Lastly, the district court's "final judgment" is not truly a decision on the merits; rather, it is an order to enforce an award resulting from litigation elsewhere, which is not necessarily given *res judicata* effect in foreign jurisdictions.[59]

This case also differs significantly from *Kaepa,* in

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[59] Proceedings in multiple jurisdictions normally should be allowed at least until judgment is reached in one, at which point *res judicata* can be pleaded in the other. *Laker Airways Ltd. v. Sabena,* 731 F.2d 909, 926-27 (2d Cir.1984). The implication of this principle is that comity concerns diminish once a final judgment has been reached in one court. *See id.* at 928. This rule-of-thumb is inapplicable here, however, where the U.S. court acts merely as a secondary-jurisdiction court under the Convention; it only enforces, or refuses to enforce, awards arbitrated elsewhere, and those decisions do not automatically receive *res judicata* effect.

which we found comity concerns insignificant because that case dealt with a contractual dispute between private parties and was "long and firmly ensconced within the confines of the United States judicial system."[60] Unlike the foreign litigation at issue in *Kaepa,* this case implicates public international issues and has been litigated chiefly in non-American fora.

The instant dispute implicates three public international issues. First, this is not a purely private dispute, as Pertamina is wholly owned by the GOI, and the claims at issue in the arbitration arose from sovereign acts of that government. Second, even if Pertamina is acting in bad faith by pursuing annulment in Indonesia (as it appears to be), the district court's attempt to enjoin Pertamina effectively translates into an attempt to enjoin the Indonesian court itself and to interfere with the sovereign actions of the GOI.[61] When viewed in a vacuum, enjoining Pertamina might appear to be the right answer in this case; but when viewed in total context, its effect tends to clash with the general

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[60] 76 F.3d at 627.

[61] We recognize that the district court was familiar with its role under the New York Convention, and was attempting only to thwart the actions of Pertamina and not Indonesia courts generally. Nonetheless, after review of the record and the Indonesian court's holdings, we conclude that an attempt to enjoin Pertamina has the undeniable effect, even if unintended, of an attempt to enjoin the courts of Indonesia themselves. *See Donovan v. City of Dallas,* 377 U.S. 408, 413, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964) (citations omitted) (indicating that an injunction issued at a party does not avoid the tension such an injunction creates with the other court exercising jurisdiction over that party).

principle that a sovereign country has the competence to determine its own jurisdiction and grant the kinds of relief it deems appropriate.

Third, and perhaps most importantly, allowing such an injunction to stand could set an undesirable precedent under the Convention, permitting a secondary jurisdiction to impose penalties on a party when it disagrees with that party's attempt to challenge an award in another country. It is at least conceivable that by using the district court's decision as persuasive authority, an enforcement court in a future dispute might attempt to enjoin proceedings in countries with arguable primary jurisdiction, or in countries with clear primary jurisdiction but with which the enforcement country's court radically disagrees. Reaching out to enjoin proceedings abroad cuts against the Convention's grants of separate and limited roles of primary-jurisdiction courts to annul awards, and of secondary-jurisdiction courts to enforce, or refuse to enforce, awards in their own countries.[62] In sum, an injunction here is likely to have the practical effect of showing a lack of mutual respect for the judicial proceedings of other sovereign

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[62] As the Supreme Court has indicated, "[t]he utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639, n. 21, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Even though the *Mitsubishi* court was primarily addressing the arbitrability of disputes raising anti-trust issues, its guidance nevertheless still applies here, where exercise of a court's traditional equitable power threatens to upset the Convention's assignment of limited, distinct roles to national courts in the confirmation and enforcement process.

nations and to demonstrate an assertion of authority not contemplated by the New York Convention.

In addition, the procedural chronology of this case illustrates the inherently international character of the proceedings themselves. This case (1) arises from contracts negotiated and allegedly breached in Indonesia, (2) was arbitrated and litigated originally in Switzerland, and, (3) involves primarily non-United States parties. Although enforcement of the Award in the United States may well satisfy much or even all of KBC's claim, our courts are nonetheless courts of secondary jurisdiction, empowered only to enforce or refuse to enforce the foreign award, and then only within the United States. Thus, the courts of this country do not maintain nearly as meaningful an interest in the resolution of this dispute, other than to give effect to a foreign arbitral award, as they do in the great majority of the cases they hear.

It is true that Pertamina is likely in the wrong here, and that Indonesia's injunction and annulment may violate comity and the spirit of the Convention much more than would the district court's injunction. In reality, however, a U.S. court's injunction is powerless to prevent or terminate such foreign actions. The Convention already appears to allow for some degree of forum shopping[63] and, as with many

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[63] *See* Quigley, at 1070 (finding that Article V.2(a)-enabling an enforcement court to refuse recognition and enforcement if the subject matter of the dispute is not amenable to settlement by arbitration under the arbitration law of the enforcement country-grants parties who succeeded in arbitration a certain degree of forum-shopping when choosing where to enforce the award).

treaties, the efficacy of the Convention depends in large part on the good faith of its sovereign signatories.[64] Upholding the district court's injunction could only further exacerbate the problem, diplomatically if not legally as well.

3. *Summary*

Although Indonesia has already purported to annul the Award, such annulment in no way affects the authority of the district court (or this court) to enforce the Award in the United States-which is, after all, the principal task of a U.S. court under the Convention. And, the Award can be enforced here with or without the district court's injunction against Pertamina. Similarly, other enforcement jurisdictions will be forced independently to weigh the Indonesian annulment with or without awareness of a U.S. court's injunction. Inasmuch as the Convention provides for multiple proceedings and a more limited role for enforcement jurisdictions, Pertamina's actions in Indonesia, even if spurious, are less vexatious and oppressive than they would be outside of this treaty structure. Finally, given the absence of a practical, positive effect that any injunction could have, more weighty considerations of comity dictate that the better course for U.S. courts to follow is to avoid the appearance of reaching out to interfere with the judicial proceedings in another country and to avoid stepping

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[64] *See id.* (arguing that an enforcement country's authority in Article V.2(b) to refuse enforcement if contrary to its public policy "has the effect of relegating the ultimate decision on the efficacy of the Convention to the good faith of the Contracting States").

too far outside its limited role under the Convention.

D. THE CONTEMPT ORDER

Although the district court denied Pertamina's motion to purge contempt, it expressly held that the TRO and contempt order were "superceded by th[e] preliminary injunction, and all restraints not expressly set forth in [the injunction were] dissolved." Given this pronouncement, the only district court order that should be subject to review on appeal to us is the preliminary injunction. By reversing and vacating the preliminary injunction, we addressed the substantive provisions of the contempt order, most importantly the indemnification provisions, that were included in the injunction, thereby making it unnecessary for us to address now the contempt order itself. Nevertheless, because the parties chose to focus separately on the contempt order, and because we want to make clear that no part of the contempt order remains valid, we briefly address the contempt order as well.

In *United States v. United Mine Workers of America,* the Supreme Court held that even though *criminal* contempt orders endure if the injunction on which they are based is vacated or found moot, "[t]he right to remedial relief [through a *civil* contempt order] falls with an injunction which events prove was erroneously issued."[65] We and several other

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[65] 330 U.S. 258, 294-95, 67 S.Ct. 677, 91 L.Ed. 884 (1947) ("It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may

circuits have expressly adopted this rule.[66]

Given the rule's clarity, the only remaining question is whether the contempt order that the district court imposed on Pertamina is civil or criminal. The Supreme Court has indicated that "[i]t is not the fact of punishment but rather its character and purpose that often serve to distinguish civil from criminal contempt."[67] Thus, we have stated that "[t]he test for determining the civil or criminal nature of a contempt order is the apparent purpose of the trial court in issuing the contempt judgment."[68] When the purpose is punitive or the injunction is "designed to vindicate the authority of the court," the contempt order is criminal, but when the court is

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profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order.").

[66] *United States Steel Corp. v. United Mine Workers*, 519 F.2d 1236, 1249 (5th Cir.1975) (recognizing and applying the rule that "disobedience of a void preliminary injunction does not carry civil contempt penalties"). *See also Klett v. Pim*, 965 F.2d 587, 590 (8th Cir.1992) (finding that "[c]ompensatory civil contempt does not survive if the underlying injunction is vacated because it was issued erroneously"); *Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d 869, 871 (9th Cir.1992) (finding that "once an injunction in a civil case has been invalidated, rights granted under the injunction no longer exist and cannot be enforced"); *Blaylock v. Cheker Oil Co.*, 547 F.2d 962, 966 (6th Cir.1976) (recognizing and applying from *United Mine Workers* rule); *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1345 (3d Cir.1976) (affirming rule that "compensatory civil contempt does not survive the abrogation of the underlying decree").

[67] *Shillitani v. United States*, 384 U.S. 364, 369, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) (citation and internal quotation marks omitted).

[68] *In re Hunt*, 754 F.2d 1290, 1293 (5th Cir.1985).

coercive or remedial in its purpose, the order is civil.[69]

In the instant case, the district court expressly held Pertamina to be in civil contempt of court. In addition, although the district court was motivated to maintain the status quo and protect its own authority, the express commands of the contempt order were directed at shepherding Pertamina's future actions, not necessarily punishing it for past misbehavior: (1) The order directed Pertamina's counsel to withdraw the application for injunctive relief that was pending before the Indonesian court; (2) it directed Pertamina to request that the Indonesian courts vacate any court-ordered injunctive relief; (3) it directed Pertamina to indemnify KBC for any future monetary penalties imposed by Indonesian court; (4) it declared that KBC has no obligation to pay Pertamina any penalties that might be imposed by Indonesian courts; and (5) it ordered Pertamina to pay KBC for fines imposed by any other court because of KBC's violation of the Indonesian court injunction and to do so before KBC's payment is due to such courts. In short, most, if not all, of the penalties imposed on Pertamina by the district court's contempt order were meant to coerce Pertamina to end all actions in Indonesian courts and refrain from acting on any decrees of those courts.[70] As best we can tell, Pertamina's apparent failure to stop the Indonesian proceedings never resulted in immediate monetary

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[69] *Id.* (citation and internal quotation marks omitted).

[70] The Preliminary Injunction Order substantially repeated the demands upon Pertamina.

penalties against KBC.

The obvious purpose of the district's court's contempt order was to constrain Pertamina to comply with the court's substantive orders rather than to punish Pertamina for any past misconduct. Coupled with the district court's express civil label, these particular aspects of the contempt order satisfy us that it is truly civil in character, which requires us to vacate that order, to the extent it still persists, along with the preliminary injunction, as dictated by the criminal/civil dichotomy of *United Mine Workers.*[71]

III. CONCLUSION

We empathize with the district court and share its frustrations at the acts of Pertamina and its counsel. For the foregoing reasons, however, we are constrained to reverse the district court and vacate the preliminary injunction and, as necessary, the contempt order against Pertamina.

REVERSED; PRELIMINARY INJUNCTION (and ORDER OF CONTEMPT) VACATED.

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[71] 330 U.S. at 294-95, 67 S.Ct. 677.

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

IN THE MATTER OF AN ARBITRATION BETWEEN ARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Respondent.

CIVIL ACTION NO. H-01-0634

May 30, 2003

MEMORANDUM AND ORDER

This matter is before the Court on Perusahaan Pertambangan Minyak Dan Gas Bumi Negara's ("Pertamina's") Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) ("Rule 60(b) Motion") [Doc. # 208].[1] Pertamina asks the Court to vacate its

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[1] *See* Pertamina's Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 209], and documentary exhibits and authorities [Doc. # 211] and expert reports [Doc. # 212] in support thereof; KBC's Memorandum in Opposition to Pertamina's Motion to Set Aside

December 4, 2001 Judgment ("Final Judgment") granting summary judgment to Karaha Bodas Company, L.L.C. ("KBC") and confirming the award of an international arbitration tribunal ("Tribunal") of more than $260 million to KBC ("Arbitral Award"). Pertamina filed its current motion pursuant to Federal Rule of Civil Procedure 60(b) almost a year after filing its Notice of Appeal from the Final Judgment. The Fifth Circuit has remanded the case to this Court for the limited purpose of determining the merits of the Rule 60(b) Motion.

Pertamina's 60(b) Motion has three parts: (1) a request for relief from this Court's December 4, 2001 Final Judgment under Rule 60(b)(2) based on newly discovered evidence, namely, the existence of political risk insurance coverage for the investment in the Project pursuant to which certain KBC investors were paid $75 million; (2) a request for relief from the December 4, 2001 Final Judgment under Rule 60(b)(5) because the Central Jakarta District Court annulled the underlying Arbitral Award on August 27, 2002; and, alternatively, (3) a request that the December 4, 2001 Final Judgment be deemed satisfied to the extent of the $75 million dollar insurance payment. This Court partially denied Pertamina's Rule 60(b) Motion to the extent it sought

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Judgment [Doc. # 220]; Pertamina's Reply Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 231], and expert reports [Doc. # 232] in support thereof; KBC's Sur-Reply to Pertamina's Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 239]; and Pertamina's Rebuttal Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 240].

relief based on the Indonesian annulment by its Memorandum and Order issued April 16, 2003 [Doc. # 247]. Having considered the parties' voluminous submissions, all matters of record, and applicable legal authorities, the Court now **denies** the remainder of Pertamina's Rule 60(b) Motion related to "new" evidence of a political risk insurance policy under which certain KBC investors were paid $75 million.

I. BRIEF FACTUAL AND PROCEDURAL BACKGROUND

This Court has issued several written decisions in this case and will not repeat the factual background of this case on detail here.[2] Briefly, this matter arises out of contracts between Pertamina and KBC for the construction and operation of an electrical power plant in Indonesia (the "Project"). The parties executed two contracts, the Joint Operation Contract ("JOC") and Energy Sales Contract ("ESC"), both of which contained an arbitration clause calling for arbitration of disputes under the Arbitral Rules of the United Nations Commission on International Trade ("UNCITRAL"). After the Project was suspended by the government of Indonesia, KBC initiated arbitration proceedings. The parties

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[2] For more detailed background information, *see* Memorandum and Order issued November 30, 2001 granting summary judgment in favor of KBC [Doc. # 45]; Memorandum and Order issued April 26, 2002 granting an injunction against Pertamina [Doc. # 137]; Memorandum and Order issued April 16, 2003 denying in part Pertamina's Rule 60(b) Motion [Doc. # 247].

participated in an arbitration in Geneva, Switzerland, which resulted in the December 2000 Arbitral Award of over $260 million in favor of KBC. The issue currently before the Court involves a "political risk" insurance policy pursuant to which certain KBC investors were paid $75 million.[3] Pertamina contends that this insurance policy was responsive to its arbitration discovery request for any documents showing what consideration KBC and its investors, specifically FPL Energy ("FPL") and Caithness, gave to providing the $500 million financing necessary for the Project, and for all documents they considered in making their financing decisions.[4] KBC refused to agree to Pertamina's requested discovery. The Tribunal deferred ruling on the discovery dispute until the conclusion of the merits hearing. At the merits hearing, Robert McGrath, Treasurer of the FPL Group, of which FPL is a subsidiary, testified regarding FPL's willingness to finance the project. When questioned by a member of the Tribunal as to as to whether the Project was protected by "OPIC political risk insurance,"[5]

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[3] The named insureds on the policy at issue are Karaha Bodas Investment Company, Caithness Indonesia Power Partners LP, Caithness Energy L.L.C., and Duval Corporation. FPL is not a named insured. Ex. 58 to Pertamina's Reply, Policy No. 97BPL2126.

[4] *See* Schedule to Pertamina's May 16, 2000 submission to the Tribunal, Ex. 22 to Pertamina's Rule 60(b) Motion.

[5] "OPIC," the Overseas Private Investment Corporation, is a United States government sponsored entity that provides political risk insurance. KBC's Opposition, at 5; Ex. D to Pertamina's Rule 60(b) Motion, Expert Report of Daniel R. Coquillette ("Coquillette Report"), ¶ 18 n. 1. Pertamina was aware at the time of aribitration that other similar projects, known as Himpurna and Patuha Power, in which PLN, the

McGrath testified "I am not sure of that. I know there was some discussions at the time, but I don't recollect as to whether it was or wasn't." Arb. Tr. 453:17-21. A primary basis for Pertamina's motion is that this statement misled the Tribunal into concluding that there was in fact no political risk insurance of any kind for the Project.

At the conclusion of the arbitration hearing on the merits of KBC's claims, the Tribunal asked whether the parties desired a decision from the Tribunal on the stayed discovery requests. Arb. Tr. 807:2-17. In response, counsel for Pertamina and PLN stated that he was prepared to rest on the record as it stood, saying "[o]ur request went to the purported ... financing that would have been made available and other things, and I think the record on that has been fully made. I am prepared to rest on that record, and so I think the discovery requests should no longer be in the picture." Arb. Tr. 807:2-808:13. Further, counsel for Pertamina commented "this has gone very nicely and the Tribunal has done a marvelous job." Arb. Tr. 814:11-13.

Pertamina contends that it first became aware of the possible existence of the insurance policy from an article in a Jakarta newspaper in July 2002, and confirmed its existence through limited discovery allowed by a Canadian court in a proceeding by KBC to enforce the Award. Pertamina therefore argues that it made this Motion as soon as possible upon

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Indonesian state-owned oil company, was involved were covered by OPIC insurance.

discovery of the new evidence. KBC points out, in contravention of those representations, that KBC's Certificate of Interested Persons filed in this case March 8, 2001, disclosed several Lloyd's Syndicates as having a financial interest in the litigation and should have alerted Pertamina to the existence of the policy at issue.[6]

II. LEGAL STANDARDS

Rule 60(b)(2) provides for relief from judgment on the basis of newly discovered evidence where the movant shows "that the evidence was discovered following the trial, that he used due diligence to discover the evidence at the time of the trial, that the evidence is not merely cumulative nor impeaching, that it is material, and that a new trial in which the evidence was introduced would probably produce a different result." *Government Fin. Servs. v. Peyton Place, Inc.*, 62 F.3d 767, 771 n. 10 (5th Cir. 1995) (quoting *Chilson v. Metropolitan Transit Auth.*, 796 F.2d 69, 72 (5th Cir. 1986)).

The judgment from which Pertamina seeks relief grants KBC summary judgment for enforcement of its Arbitral Award. KBC's motion was governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 (the "New York Convention"), codified at 9 U.S.C. § 201 *et seq.* Thus, in order to be entitled to relief, Pertamina must show that the insurance policy would have

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[6] *See* Certificate of Interested Persons dated March 8, 2001 [Doc. # 4].

created a genuine issue of material fact on one of the defenses to enforcement of the Arbitral Award recognized by the New York Convention. Pertamina argues that KBC's failure to produce the insurance policy in the arbitration shows that it was prevented from presenting its case within the meaning of Article V(1)(b) of the Convention, and that KBC's withholding of the policy violated its "duty of candor to the Tribunal" and is contrary to United States public policy, thus supporting a defense to enforcement under Article V(2)(b) of the Convention. Pertamina further argues that the existence of the policy underscores that it should have been granted discovery before entry of summary judgment in this case.

III. ANALYSIS

A. "Newly Discovered Evidence"

A few preliminary points are appropriate before addressing the major arguments briefed by the parties. Pertamina argues that the Fifth Circuit, by its *Per Curiam* Order remanding this case, intended to suggest that the insurance policy is newly-discovered evidence under Rule 60(b).[7] The Court disagrees. To the contrary, had the Court of Appeals had such a view, it would have explicitly so ruled. The Court interprets the remand order to allow this

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[7] The remand was for the limited purpose of "determin[ing] the impact of Pertamina's newly discovered evidence of the existence of political risk insurance coverage on the judgment confirming the arbitration award." Order in Appeal No. 02-20042 dated March 5, 2003, at 13-14.

Court to make its own determinations on all the issues presented in the Rule 60(b) Motion.

In any event, the Court assumes the existence of the insurance is "newly discovered" evidence and considers Pertamina's arguments on their merits. While there are serious questions about whether Pertamina lacked notice of the insurance once KBC commenced this case, this issue involves a fact-intensive inquiry that is unnecessary to resolution of the pending motion. Thus, the Court does not reach KBC's contention that Pertamina's Rule 60(b) Motion is not based on "newly discovered" evidence.

B. Article V(1)(b) - Due Process

The New York Convention provides for denial of confirmation of an arbitral award if the party against whom it is invoked can prove that it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." 9 U.S.C. § 201, Art. V(l)(b). This enumerated defense "essentially sanctions the application of the forum state's standards of due process." *Iran Aircraft Indus. v. AVCO Corp.*, 980 F.2d 141, 145-46 (2d Cir. 1992). The fundamental requirement of due process is the opportunity to be heard at a "meaningful time and in meaningful manner." *Id.* at 146. Enforcement of the award may be denied only if there was a procedural infirmity that rendered the proceedings fundamentally unfair and caused prejudice to the complaining party. *Compagnie Des Bauxites De Guinee v. Hammermills, Inc., No.* 90-0169,1992 WL 122712, *5 (D.D.C. May 29, 1992). A fundamentally

fair hearing is one that meets the minimum requirements of fairness: adequate notice, a hearing on the evidence, and an impartial decision by the arbitrators. *See Generica Ltd. v. Pharm. Basics,* 125 F.3d 1123, 1130 (7th Cir. 1997); *Sunshine Mining Co. v. United Steelworkers,* 823 F.2d 1289, 1295 (9th Cir. 1987). The right to due process does not, however, encompass all the detailed procedural rights set forth in the Federal Rules of Civil Procedure. *Imperial Ethiopian Gov't v. Baruch-Foster Corp.,* 535 F.2d 334, 337 (5th Cir. 1976); *Empresa Constuctora Contex Limitada v. Iseki, Inc.,* 106 F. Supp. 2d 1020, 1026 (S.D. Cal. 2000); *see also In re Arbitration between Trans Chemical Ltd. and China Nat'l Mach. Import and Export Corp.,* 978 F. Supp. 266, 310 (S.D. Tex. 1997) (holding that "[t]he right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By agreeing to arbitration [the respondent] subjected itself to its advantages and disadvantages.").

Pertamina argues that the existence of political risk insurance refutes KBC's contention at arbitration that FPL was willing to finance the project to protect its $40 million investment, and casts serious doubt on KBC's contention, adopted by the Tribunal, that the parties' contract provided that Pertamina and PLN bore the entire risk of government action suspending the Project. Pertamina further argues that the amount of the insurance policy calls into question the amount of KBC's damages. Thus, Pertamina contends that the denial of discovery prevented it from discovering the insurance policy and in turn prevented it from presenting its case to the Tribunal.

These arguments lack merit. Pertamina's inability to offer evidence of the political risk insurance policy at the arbitration did not prevent it from receiving a fundamentally fair hearing. The context in which the financing issue arose is significant to the analysis of Pertamina's contentions. At the inception of the Project and continuing for several years, KBC intended to finance the Project through third-parties, such as banks. *See* Pertamina's Memorandum, at 5-6 and Exhibits 3-13. However, Pertamina argued in its opening arbitration brief that "no third party was willing to provide financing for projects in Indonesia in 1998 due to Indonesia's unstable political and economic situation." *Id.* at 6. As Pertamina itself frames the issue: "KBC's claim for $667.1 million in damages required that KBC could have performed the contract profitably *absent the alleged breach.* At the threshold, therefore, KBC had to prove that it could have obtained the $500 million necessary to construct the generating facilities on which its damage claim depended." *Id.* at 4 (emphasis added). Thus, the issue is whether KBC could have gone forward with the project if Pertamina and PLN met their obligations.

McGrath acknowledged the problem facing KBC in 1998 in obtaining third-party financing. *Id.* at 6; Ex. 17 to Pertamina's Rule 60(b) Motion, Declaration of Robert McGrath ("McGrath Declaration"), ¶ 21. However, McGrath and another KBC witness, Leslie Gelber, President and Chief Operating Officer of Caithness Energy L.L.C. and former Vice President of FPL, testified that FPL was willing in 1998 to

provide the necessary financing because (1) FPL entities had already invested $40 million in the Project; (2) the ESC and JOC are dollar denominated; (3) the Project had the possibility for development of greater than 210 MW of energy; and (4) the ESC obligated PLN to obtain for KBC a letter of support of the type generally acceptable to lenders. McGrath Declaration, ¶¶ 15, 21-35; Ex. 18 to Pertamina's Rule 60(b) Motion, Declaration of Leslie Gelber ("Gelber Declaration"), ¶¶ 10, 26-35; Arb. Tr. 58:7. Thus, while in a general sense the availability of insurance may be a relevant factor that a prudent investor might consider in making a decision about project financing, the existence $75 million in insurance coverage on a $500 million project does not contradict or "refute" KBC's evidence that financing was available. This is particularly true where, as here, the proposed project financing was to come from an investor that was not the insured under the political risk insurance policy.[8]

Pertamina's argument that the insurance policy refutes KBC's evidence regarding FPL financing is in actuality an attempt to challenge the credibility of KBC's witnesses.[9] Had the insurance policy been in evidence, the Tribunal presumably would have weighed it along with the testimony of McGrath and Gelber. The Tribunal found KBC's witnesses credible and ruled, "[r]egarding the financing necessary for the Project development, there is no reason in the

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[8] There is no evidence before the Court that the Caithness entities and FPL are not separate legal entities.

[9] *See* Coquillette Report, ¶¶ 25-26.

Arbitral Tribunal's opinion to cast doubts about [KBC's] readiness, directly and/or through its shareholders, to make provision thereof." Ex. 24 to Pertamina's Rule 60(b) Motion, Arbitral Award, ¶132. Credibility determinations, and weight of the evidence considerations, are beyond the purview of this court in reviewing the Arbitral Award, particularly upon a Rule 60(b) motion. *See Government Fin. Servs,* 62 F.3d at 771 n.10.

Pertamina's second argument, that the existence of the political risk insurance policy belies KBC's position that the contracts allocated such risk to Pertamina and PLN, also is unavailing. The allocation of risk is a contractual matter. The Court will not look to a third party contract like the insurance policy to determine the intent of the parties to the ESC and JOC. The Court agrees with the basic premise asserted by Pertamina's expert, Daniel R. Coquillette, that an individual or entity must have an insurable interest to secure an insurance policy.[10] However, KBC's investors clearly had an insurable interest in their investments. Some or all of the investors were entitled to attempt to partially protect their investments in the event the Project was terminated and PLN or Pertamina failed to live up to the contractual obligation to assume certain risks. It is not unusual for a party to have multiple layers of protection for a single interest; indeed, this practice is anticipated in the insurance policy's subrogation provision requiring repayment in

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[10] *See* Coquillette Report, ¶¶ 23-25.

the event an insured recovers from another source for an injury.

Similarly, the insurance policy, which had a coverage limit of $80 million, is not probative of the amount of KBC's damages. The insurance policy covered only some investors, not including FPL, in the event the Project did not go forward due to governmental action. There is no evidence that the policy was expected to cover the entire value of the Project, including potential lost profits. The Arbitral Award compensated KBC approximately $111 million for its expenses and $150 million for lost profits. Arbitral Award, ¶¶ 108, 136. The $75 million paid under the insurance policy is not so inconsistent with the Arbitral Award of approximately $111 million for expenses as to constitute evidence refuting KBC's proof of its damages. Moreover, insurance coverage costs money. A higher amount of protection requires a higher premium. Complex business decisions typically are involved in determining the appropriate amount of coverage. The extent of potential exposure to loss is only one element of that decision. The amount of insurance carried by a KBC investor simply is not probative of the actual damages incurred by KBC due to Pertamina's and PLN's breach of the parties' agreements.

The insurance policy, at best, is evidence that certain investors in the Project were protected to a limited extent in the event that the Project was terminated for political reasons. KBC, however, in order to succeed on its claims, was not required to prove at the arbitration that neither it nor any of its

investors had political risk insurance. Pertamina has proffered no legally viable defense that would have been established by, or meaningfully supported by, proof that such insurance existed. The existence of the political risk insurance policy at issue suggests only that certain KBC investors had some doubts about the ability to collect damages *if* Pertamina or PLN failed to perform under the contracts as agreed. This is an entirely different matter from the issues of whether a different KBC investor would lend significant sums to fund the Project or whether the contracting parties had agreed that Pertamina would bear the risk of the Indonesian Government's intervention to stop the project. Thus, Pertamina's inability to rely on the insurance policy during the arbitration did not prevent Pertamina from presenting a meaningful case against KBC, and there was no denial of due process.

The circumstances here are materially distinquishable from those in *Iran Aircraft Indus. v. Avco, 980* F.2d 141 (2d Cir. *1992),* in which the Second Circuit refused to enforce an arbitral award pursuant to Article V(1)(b) of the New York Convention. In that case, the arbitration tribunal told the claimant, Avco, that it could present its evidence in summary form to support its damages claim. Yet, the Tribunal later denied Avco relief because Avco failed to present the underlying invoices to support its damage request. *Id.* at 146. The district court concluded, and the Second Circuit agreed, that the tribunal had prevented Avco from meaningfully presenting its damages case because the tribunal had changed the evidentiary requirements without notice to Avco.

Pertamina, in contrast, was not denied the opportunity to present a meaningful case to the Arbitral Tribunal. Pertamina was allowed to present and cross-examine witnesses. Pertamina submitted extensive briefing to the Tribunal. Pertamina knew McGrath and Gelber were testifying for KBC on the issue of financing, and it had an opportunity to conduct cross-examination to ask about the existence of political risk insurance if it was relevant. Nevertheless, Pertamina contends that procedural rules governing the arbitration prevented Pertamina from further questioning McGrath after the Tribunal posed its question regarding OPIC insurance during KBC's redirect of McGrath. However, Pertamina never asked for permission to do so. Further, Pertamina never pursued its earlier requests for discovery and did not ever specifically request insurance information, even after the subject was raised with McGrath by a Tribunal member. The Tribunal expressly gave the parties at the arbitration an opportunity to present or renew procedural objections. Pertamina stated that it had none. Pertamina did not argue to the Tribunal that McGrath's testimony illustrated the relevance and necessity of the discovery it had sought from KBC. The Tribunal itself, had it been interested or found it relevant, could have followed up on McGrath's testimony and asked him or KBC for information about political risk insurance. None of these things occurred. Instead, Pertamina withdrew its discovery requests, and informed the Tribunal that it was satisfied that it had been given a fair hearing. Under the circumstances, Pertamina was not denied due process. *See In re Arbitration between Trans*

Chemical Ltd. and China Nat'l Mach. Import and Export Corp., 978 F. Supp. 266, 307 (S.D. Tex. 1997) (confirming arbitration award where respondent did not pursue discovery with tribunal and stated at the conclusion of the arbitration hearing that the arbitration had been conducted with "propriety and fairness").

In hindsight, Pertamina apparently wishes it had done things differently. As with its belated decision to pursue annulment proceedings in the Indonesian courts after initially futilely seeking review in the Swiss Supreme Court, Pertamina now attempts to undo the effect of an unsuccessful strategic decision made years ago during the arbitration itself.[11]

Pertamina supplies no probative reasons to undermine the validity of a properly convened and conducted arbitration, or the integrity of the international arbitration system. Submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial. But because `the advantages of arbitration are speed and informality, an arbitrator should be expected to act affirmatively to simplify and expedite the proceedings before him. Thus, whatever indignation a reviewing court may experience in examining the record, it must resist the temptation to condemn

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[11] Pertamina's argument could be said to be a further attempt to avoid the impact of its arbitration agreement, as suggested by Pertamina's repeated and unexplained lengthy delays *inter alia* in appointing arbitrators and filing arbitration briefs.

imperfect proceedings without a sound statutory basis for doing so. *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas, 915* F.2d 1017, 1022 (5th Cir. 1990) (confirming award under Federal Arbitration Act). The fact that post-arbitration discovery revealed a marginally relevant document that Pertamina now believes it could have used (largely for impeachment purposes) at the arbitration does not establish a denial of due process attributable to the Tribunal's, or this Court's, refusal to grant requested discovery.

In judging discovery requests in this context, the court must weigh the asserted need for hitherto undisclosed information and assess the impact of granting such discovery on the arbitral process. The inquiry is an entirely practical one, and is necessarily keyed to the specific issues raised by the party challenging the award and the degree to which those issues implicated factual questions that cannot be reliably resolved without some further disclosure. *Frere v. Orthofix, Inc.*, 2000 WL 1789641, * 5 (S.D.N.Y. Dec. 6, 2000); *see Lummus Global Amazon, S.A. v. Aguaytia Energy Del Peru, S.R. LTDA*, 2002 WL 31401996, *26-27 (S.D. Tex. March 27, 2002) (court denied discovery because the record was adequate to permit the court to decide the issues presented).[12]

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[12] The *Lummus* court remanded the case to the International Chamber of Commerce on two narrow, specific, and limited issues. 2002 WL 31401996 at *36, *41. Neither party here has requested remand to the Arbitral Tribunal, and the circumstances necessitating remand in *Lummus, i.e.*, the failure of the arbitration panel's ruling to resolve all issues raised by the parties with certainty, is not present in this case.

The issue before this Court on summary judgment was whether Pertamina had a fundamentally fair hearing during the arbitration. The Court held, after close consideration of the extensive submissions and arguments by the parties, that the arbitration procedure and result did not violate Pertamina's due process rights. The record on summary judgment amply supports the Court's ruling, which was based *in part* on Pertamina's tactical decision to withdraw its discovery requests at the end of the arbitration hearing. The allegedly new evidence on which Pertamina relies to seek reconsideration does not alter the Court's conclusions. Pertamina's Rule 60(b) Motion based on Article V(1)(b) of the New York Convention is denied.

C. Article V(2)(b) - Public Policy

The Convention allows confirmation of an award to be refused if "the recognition or enforcement of the award would be contrary to the public policy of that country." 9 U.S.C. § 201, Art. V(2)(b). The public policy defense applies only in the narrowest of circumstances. Courts repeatedly have held that the public policy defense requires a violation of the "most basic notions of morality and justice." *Slaney v. Int'l Amateur Athletic Fed'n,* 244 F.3d 580, 593 (7th Cir. 2001) (quoting *Fotochrome, Inc. v. Copal Co.,* 517 F.2d 512, 516 (2d Cir. 1975); *see also Europcar Italia, S.p.A. v. Maiellano Tours, Inc.,* 156 F.3d 310,315 (2d Cir. 1998); *Industrial Risk Ins. v. M.A.N. Gutehoffnungshutte GmbH, 141* F.3d 1434, 1445 (11th Cir. 1998); *Parsons & Whittemore Overseas, Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA),* 508 F.2d 969, 974 (2d Cir. 1974). The

award must violate an "explicit public policy that is well-defined and dominant ... [and is] ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests." *Industrial Risk Ins.*, 141 F.3d at 1445 (quoting *Drummond Coal Co., v. United Mine Workers, Dist. 20,* 748 F.2d 1495, 1499 (11th Cir. 1984) (internal quotes deleted)). The Court is not persuaded that KBC's failure to bring its investors' insurance policy to the Tribunal's attention renders the Arbitral Award void under the New York Convention.

The right to discovery in an arbitration is far more limited than in a traditional civil litigation under the Federal Rules of Civil Procedure. *Frere v. Orthofix, Inc.*, 2000 WL 1789641, *4-5 (S.D.N.Y. 2000); *see Forsythe Int'l,* 915 F.2d at 1022 (noting in review of an arbitration under the Federal Arbitration Act that "such proceedings require `expeditious and summary hearing, with only restricted inquiry into factual issues,'" quoting *Legion Ins. Co. v. Insurance General Agency,* 822 F.2d 541, 543 (5th Cir. 1987)). Thus, KBC's duty to voluntarily produce information or documents in the arbitration process is not to be judged by the extensive disclosure requirements for civil discovery under the Federal Rules. Furthermore, KBC did not "secretly" withhold a relevant document, as Pertamina contends. KBC consistently objected to Pertamina's discovery requests. Assuming for the sake of this analysis that the insurance policy was responsive to one of Pertamina's document requests, the Tribunal was aware of the parties' discovery dispute. The Tribunal never ordered KBC to produce

responsive documents; instead, the Tribunal took the matter under advisement until after the hearing. Whether the Tribunal would have allowed further discovery before issuing its Final Award if Pertamina had not withdrawn its request cannot be known by this Court, nor Pertamina's expert.[13] Pertamina must live with its strategy decision. It is not contrary to United States public policy for KBC to decline to voluntarily turn over documents that it had no statutory, ethical, or other obligation to produce. The refusal to produce the insurance policy is not a justifiable basis for the Court to deny confirmation of the Arbitral Award.

More significantly, Pertamina has not supported the primary contention in its Motion that KBC misled the Tribunal. There is no doubt that parties and their counsel owe a duty of candor to an arbitral tribunal.[14] However, Pertamina's argument that KBC deceived the Tribunal is premised on a mischaracterization of McGrath's testimony. McGrath was asked a direct question about the existence of OPIC insurance for the project. He answered that he recalled discussions regarding such insurance, but did not know one way or the other if any existed. There is no indication that McGrath was

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[13] *See* Coquillette Report, ¶ 36 (opining that "had the Tribunal been aware of the policy it would likely have permitted Pertamina discovery on the issue."). This opinion is nothing more than speculation and is inadmissible. *See* FED. R. Ev. *702; Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661 668 (5th Cir. 1999) (expert testimony must be more than unsupported speculation or subjective belief).

[14] *See* Coquillette Report, ¶¶ 38-42; Ex. S to Pertamina's Reply, Expert Report of Judge Stephen M. Schwebel, ¶¶ 4-9.

not truthful or was otherwise deceptive. In fact, it is just as likely that McGrath's answer led the Tribunal to believe that political risk insurance did exist as that it did not. Pertamina, had it thought necessary at the time, could have asked the Tribunal for permission to pose additional questions or requested that the Tribunal follow up. Pertamina did not do so. This was a sophisticated Tribunal, and so was Pertamina's counsel. If the interest of any of these people had been piqued by McGrath's answer, or if any had felt the existence of insurance was significant to the determination of whether KBC could have financed the project, a Tribunal member or Pertamina should have followed up at the arbitration. The failure of anyone to do so is a testament to the lack of genuine relevance of the issue.[15] There is no material issue of any deception. Rather, it appears that Pertamina may have re-evaluated its trial strategy.

Pertamina also argues that KBC breached its obligations under § 14 of the Energy Services Contract ("ESC," Ex. 2 to Pertamina's Rule 60(b) Motion). This argument lacks merit. Pertamina's contentions that the ESC required KBC to disclose the political risk insurance, and to obtain a waiver of subrogation, are contrary to the terms of that contract. The ESC requires KBC to obtain insurance policies that "shall provide at least the types of

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[15] Coquillette's putative expert testimony about what additional information the Tribunal would have been interested in based on this testimony is rank speculation, *see* Coquillette Report, ¶¶ 30-36, and is inadmissible.

insurance coverage and terms described in this Section 14." Section 14.2 lists the following types of insurance coverage KBC was obligated to obtain: (a) Construction/Erection All Risks (Clear) Insurance, which was to cover physical loss or damage to the permanent and temporary works of the facility under construction; (b) Marine Cargo Insurance, which was to cover physical loss or damage to materials, equipment, and supplies during transportation to the Project; (c) All Risks Property/Machinery Insurance, which was to cover physical loss or damage to the "Generating Facilities" as defined in the contract; (d) Comprehensive General Liability Insurance, which was to cover legal liability for damage to property or bodily injury to third parties arising out of the construction, ownership, operation, and maintenance of the Generating Facilities; and (e) Worker's Compensation Insurance. The ESC required PLN and its employees to be additional insureds under the policies. ESC § 14.3. The ESC further required PLN and KBC each to cause its insurers to waive all rights of subrogation *against the other party* in respect to any claim arising under its insurance policies. *Id.*

The ESC does not address political risk insurance. Moreover, the ESC only specifies insurance to be secured by KBC, not its investors. Pertamina, citing no authority, argues that KBC cannot avoid its obligations under the ESC by having its investors secure insurance. This contention is unpersuasive. KBC's investors are not parties to the ESC. There is no evidence that the investors are alter egos of KBC. Moreover, the fact that the ESC required PLN, an Indonesian government entity, to be named as an

"additional insured" under KBC's policies suggests that the ESC parties did not intend to include political risk insurance as part of that contract's requirements. The ESC provides no support for Pertamina's Rule 60(b) Motion.

D. Offset to Final Judgment

Finally, Pertamina contends that it is entitled to an offset of $75 million to the Final Judgment against it. Pertamina's argument is based on the fact that the ESC required KBC to secure a waiver of subrogation from its insurers. However, as discussed above, the ESC does not govern political risk insurance at all, let alone insurance purchased by a KBC investor. Pertamina's contentions must be rejected also because the insurance policy at issue contains a subrogation clause requiring the insured to repay the carrier for any benefits received if the insured recovers on a covered claim.[16] To the extent the insured (presumably one of the Caithness entities in this case) obtains any recovery based on the Final Judgment against Pertamina, the insured is obligated to repay the insurer. Thus, there will be no double recovery, and Pertamina is not entitled to any credit. The Court accordingly denies Pertamina's Rule 60(b) Motion requesting a $75 million offset to the Final Judgment.

IV. CONCLUSION AND ORDER

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[16] *See Ex. 58* to Pertamina's Reply, Policy No. 97BPL2126, at 9(5).

The Court has carefully considered each of Pertamina's arguments. Neither the existence of the political risk insurance policy under which Caithness, a KBC investor, was paid $75 million, nor the fact that the insurance policy was not disclosed to the Arbitral Tribunal, provides a ground to alter the Final Judgment granting summary judgment in favor of KBC to confirm the Arbitral Award pursuant to the New York Convention. It is therefore **ORDERED** that Pertamina's Rule 60(b) Motion [Doc. # 208] is **DENIED.**

SIGNED at Houston, Texas, this 30th day of May, 2003.

/s/

Nancy F. Atlas
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

In the Matter of an Arbitration Between
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Respondent.

No. CIV.A.H 01-0634

April 17, 2003

E. Thomas Bayko, Jones Day, Houston, TX, Kenneth S. Marks, Susman Godfrey LLP, Houston, TX, Christopher F. Dugan, Paul Hastings, Washington, DC, for Karaha Bodas Co., LLC.

Michael Lamar Brem, Baker Botts LLP, Houston, TX, Matthew D. Slater, Cleary Gottlieb, Washington, DC, F. Walter Conrad, Jr., Baker Botts, Houston, TX, Jonathan D. Schiller, William A. Isaacson, Boies & Schiller, Washington, DC, for Perusahaan Pertambangan Minyak Dan Gas Bumi Negara.

Eric Scott Lipper, Jirsch & Westheimer, Houston, TX, for Bank of America.

Patrick Carlton Appel, Adams & Reese LLP, Houston, TX, Douglas G. Boven, Crosby Heafey, San Francisco, CA, for American Overseas Petroleum, Ltd., PT Caltex Pacific Indonesia.

Jesse Ricker Pierce, Clements O'Neill, Houston, TX, Eric Grannon, Carolyn B. Lamm, Frank Panopoulos, White & Case, LLP, Washington, DC, for Ministry of Finance of Republic of Indonesia.

Roxanne Armstrong, Apache Corp., Houston, TX, for Apache Corp.

Carleton A. Davis, Hilgers & Watkins, Austin, TX, for OpicOil Houston, Inc.

ATLAS, District Judge.

This matter is before the Court on Perusahaan Pertambangan Minyak Dan Gas Bumi Negara's ("Pertamina's") Motion to Set Aside Judgment Under Fed.R.Civ.P. 60(b) ("Rule 60(b) Motion") [Doc. # 208].[1] Pertamina asks the Court to vacate its

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[1] *See* Pertamina's Memorandum in Support of its Motion to Set Aside Judgment Under Fed.R.Civ.P. 60(b) [Doc. # 209], and documentary exhibits and authorities [Doc. # 211] and expert reports [Doc. # 212] in support thereof; KBC's Memorandum in Opposition to Pertamina's Motion to Set Aside Judgment [Doc. # 220]; Pertamina's Reply Memorandum in Support of its Motion to Set Aside Judgment Under Fed.R.Civ.P. 60(b) [Doc. # 231], and expert reports [Doc. # 232] in support thereof; KBC's Sur-Reply to Pertamina's Motion to Set Aside Judgment Under Fed.R.Civ.P. 60(b) [Doc. # 239]; and Pertamina's Rebuttal

December 4, 2001 Judgment ("Final Judgment") granting summary judgment to Karaha Bodas Company, L.L.C. ("KBC") and confirming the award of an international arbitration tribunal of more than $260 million to KBC ("Arbitral Award"). Pertamina filed its current motion pursuant to Federal Rule of Civil Procedure 60(b) almost a year after filing its Notice of Appeal from the Final Judgment. The Fifth Circuit has remanded the case to this Court for the limited purpose of determining the merits of the Rule 60(b) Motion. Having considered the parties' voluminous submissions, all matters of record, and applicable legal authorities, the Court **denies in part** Pertamina's Rule 60(b) Motion and retains the remaining issues presented by the Motion **under advisement.**

I. BRIEF FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of contracts between Pertamina and KBC for the construction and operation of an electrical power plant in Indonesia (the "Project"). The parties executed two contracts, the Joint Operation Contract ("JOC") and Energy Sales Contract ("ESC"), both of which contained an arbitration clause calling for arbitration of disputes under the Arbitral Rules of the United Nations Commission on International Trade ("UNCITRAL"). After the Project was suspended by the government of Indonesia, KBC initiated arbitration proceedings, which resulted in a December 2000 Arbitral Award

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Memorandum in Support of its Motion to Set Aside Judgment Under Fed.R.Civ.P. 60(b) [Doc. # 240].

in favor of KBC.

Pertamina filed an action in the Swiss Supreme Court seeking to annul the Arbitral Award. Shortly thereafter, KBC filed the instant action to confirm the Arbitral Award. The Swiss court dismissed Pertamina's appeal for untimely payment of fees. This Court issued the Final Judgment in favor of KBC a few months later. Pertamina filed, on January 2, 2002, a timely Notice of Appeal from that Final Judgment. While its appeal was pending, Pertamina filed a new suit in Jakarta, Indonesia seeking to annul the Arbitral Award. KBC sought and obtained a Preliminary Injunction from this Court ordering Pertamina to refrain from prosecuting the Indonesian action. Despite the Preliminary Injunction, Pertamina's actions resulted in an August 7, 2002 ruling from the Indonesian court setting aside the Arbitral Award and enjoining KBC from enforcing the Award. In December 2002, Pertamina filed this Rule 60(b) Motion asserting, among other things, that this Court should grant it relief from the Final Judgment because the Arbitral Award on which it is based has been annulled by an Indonesian court. The Fifth Circuit issued a limited remand to this Court for a ruling on Pertamina's 60(b) Motion. Pursuant to the parties' agreed briefing schedule, this matter was fully briefed and ripe for adjudication as of March 26, 2002.

II. ANALYSIS

Pertamina's 60(b) Motion has three parts: (1) a request for relief from this Court's December 4, 2001 Final Judgment under Rule 60(b)(2) based on newly

discovered evidence, namely the existence of political risk insurance coverage for the investment in the Project pursuant to which KBC's investors were paid $75 million; (2) a request for relief from the December 4, 2001 Final Judgment under Rule 60(b)(5) because the Central Jakarta District Court annulled the underlying Arbitral Award on August 27, 2002; and, alternatively, (3) a request that the December 4, 2001 Final Judgment be deemed satisfied to the extent of the $75 million dollar insurance payment. This Memorandum and Order addresses only the second part of Pertamina's Rule 60(b) Motion relating to the effect of the Indonesian annulment.

Rule 60(b)(5) of the Federal Rules of Civil Procedure authorizes the Court to grant relief from its Judgment if the "judgment upon which it is based has been reversed or otherwise vacated." The Central Jakarta District Court annulled the Arbitral Award on August 27, 2002. Pertamina argues that the Jakarta annulment is valid under the Convention on the Recognition and Enforcement of Foreign Tribunal Awards ("New York Convention") because Indonesia is the court with primary jurisdiction over the Arbitral Award. Thus, Pertamina argues, this Court must vacate its Final Judgment enforcing the Arbitral Award pursuant Article V(1)(e) of the New York Convention.

The New York Convention contemplates two types of court proceedings following an arbitral award: (i) proceedings to annul or set aside the arbitral award; and (ii) proceedings seeking recognition and enforcement of the arbitral award.

See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir.1997). Pursuant to Article V(1)(e) of the Convention, a court "may" refuse recognition and enforcement of an arbitration award if it has been set aside by a court of competent authority in "the country in which, or under the law of which" the award was made. The country in which, or under the law of which, the award was made is the court of "primary jurisdiction." Proceedings for recognition and enforcement of an arbitration award may be brought in the courts of any signatory country to the Convention. Such courts are said to have "secondary jurisdiction." Pertamina has submitted the Expert Report of Albert Jan van den Berg (March 29, 2002) (Ex. 7 to Pertamina's Opposition to KBC's Application for Turnover Order and Cross Motion for Stay of Enforcement and Ex. O to Pertamina's Rule 60(b) Motion), the Opinion of Professor W. Michael Reisman (May 6, 2002) (Ex. 1 to Brief in Support of Pertamina's Motion for Partial Stay and Ex. L to Pertamina's Rule 60(b) Motion), and W. MICHAEL REISMAN, SYSTEMS OF CONTROL ININTERNATIONAL ADJUDICATION AND ARBITRATION 114 (1992) (Ex. 36 to Pertamina's Rule 60(b) Motion) is support of the New York Convention's jurisdictional scheme.

This Court is a court of secondary jurisdiction. That status constrained the Court on summary judgment to consider only the seven defenses to enforcement of the Arbitral Award specifically set forth in Article VI of the Convention, whereas a court of primary jurisdiction is not so limited. *See Yusuf*, 126 F.3d at 21 (a motion to set aside an international arbitral award is controlled by the domestic law of

the rendering state).

The general enforcement scheme of the New York Convention is not a matter of dispute. The issue presented by Pertamina's Rule 60(b) motion is whether, under that scheme, Indonesia has primary jurisdiction over the Arbitral Award. In its April 26, 2002 Preliminary Injunction, this Court concluded that the arbitration was conducted under the arbitral law of Switzerland, and thus Swiss courts have primary jurisdiction over the award. The Court stands by that decision, as explained hereafter. Because the Swiss Supreme Court rejected Pertamina's appeal, albeit on procedural grounds, Pertamina does not have a cognizable defense to the enforcement of the Arbitral Award under Article V(1)(e) of the New York Convention.

Pertamina now insists, contrary to its earlier actions and assertions, that the parties' contracts-the JOC and ESC-designate Indonesian arbitral law to govern the arbitration. Pertamina relies on the following contractual provisions for its position:

> The parties expressly agree to waive the applicability of (a) Article 650.2 of the Indonesian Code of Civil Procedure so that the appointment of the arbitrators shall not terminate as of the sixth (6th) Month after the date(s) of their appointments and (b) the second sentence of Article 620.1 of the Indonesian Code of Civil Procedure so that the arbitration need not be completed within the specific time.

JOC, Ex. 1, Article 13.2(a); ESC, Ex. 2, § 8.2(a).

> In accordance with Section 631 of the Indonesian Code of Civil Procedure, the Parties agree that the Tribunal need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Contract and the underlying intent of the Parties, and as to such matters their conclusion shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this Contract in accordance with such terms.

JOC, Ex. 1, Article 13.2(b); ESC, Ex. 2, § 8.2(b).

> The parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure neither Party shall appeal to any court ... and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of the Law No. 1 of 1950 and any other provision of Indonesian law and regulations that would otherwise give the right to appeal the decisions of the arbitral panel.

JOC, Ex. 1, Article 13.2(d); ESC, Ex. 2, § 8.2(d).

Pertamina's Indonesian law expert testifies that these provisions reference then applicable Indonesian law. "Declaration of Prof. Mr. Dr.

Sudargo Gautama"[2] (March 25, 2002) (Ex. 5 to Pertamina's Turnover Opposition and Ex. F to Pertamina's Rule 60(b) Motion). This assertion is not disputed. Moreover, it is uncontested that Indonesian law is the substantive law governing the contracts.[3] Pertamina diverges from this Court's prior ruling by arguing that the above-quoted clauses indicate the intent of the parties to adopt Indonesian law as the procedural law governing the arbitration as well. Pertamina asserts that this Court has "eschewed" an analysis of the contracts and urges the Court to adopt Pertamina's positions. Contrary to Pertamina's contentions, the Court previously has scrutinized-and again now parses-the JOC and ESC terms. The Court finds Pertamina's position on the meaning of these contracts entirely unpersuasive.

It is the general rule that the procedural law of the place of arbitration governs an arbitration. As Pertamina's expert Albert Jan van den Berg has written, "the arbitration law of the country where the arbitration takes place governs the arbitration. The

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[2] Gautama and his firm are counsel to Pertamina in the Indonesian action against KBC.

[3] To the extent Pertamina submits Gautama's Declaration as expert opinion that Indonesian law does not permit waiver of the right to seek an annulment of an arbitration proceeding, the opinion is unsupported by authority and fails the requirements for admissibility of expert opinion established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *See Tanner v. Westbrook*, 174 F.3d 542, 548 (5th Cir.1999). Among other things, the testimony must be reliable and relevant. *Pipitone v. Biomatrix*, 288 F.3d 239, 243-45 (5th Cir.2002); *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 580-81 (5th Cir.2001); *Tanner*, 174 F.3d at 546. Gautama provides no legal or other basis for his bold assertion.

place of arbitration in this sense is determined by the parties in their arbitration agreement." Albert Jan van den Berg, *When is an Arbitral Award Nondomestic Under the New York Convention of 1958,* 6 PACE L. REV. 25, 44-45 (1985). Thus, by choosing to arbitrate in Geneva, Switzerland, and not including an express provision stating that Indonesian law governs the arbitration, the parties expressed their intent that the arbitration would be governed by Swiss law. *See also Karaha Bodas Co. v. Pertamina,* No. 28 OF 2002, In the High Court of the Hong Kong Special Administrative Region Court of First Instance (J. Burrell, Mar. 27, 2003) [Doc. # 242], at 14 ("I find it irresistible that the choice of Geneva as the 'place' was also a choice that it was the formal 'seat' in the legal sense. By the same token it is plain that the choice of an independent neutral seat of arbitration carried with it an intention to be bound by the *lex arbitri* of that place.").

Pertamina also cites H.G. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 20 (2002) (Ex. 40 to Pertamina's 60(b) Motion), for the proposition that a provision calling for arbitration in one country under the arbitration law of another country "often occurs in international transactions, particularly in State contracts to which one of the contracting parties is a State or related entity." However, other authorities submitted by Pertamina call such agreements "unusual," "exceptional," or a "dead letter." *See* Declaration of Prof. Mr. Dr. Sudargo Gautama, ¶ 14 (Ex. F to Pertamina's Rule 60(b) Motion); Expert Report of Albert Jan van den

Berg, ¶¶ 9, 20 (Ex. O to Pertamina's Rule 60(b) Motion); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 21 n. 3 (2d Cir.1997). In any event, the issue is purely academic because the contracts at issue here contain no provision calling for arbitration under the arbitration law of another country different from the country where the arbitration was held.

The Court agrees with Pertamina's contention that the parties have contractual autonomy to chose the applicable arbitral law. *See* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARD A UNIFORM INTERPRETATION 267 (1981) (Ex. 41 to Pertamina's 60(b) Motion). "The first rule is the primary rule of party autonomy according to which the parties have the liberty to subject the arbitration agreement to the law of their choice. The second rule is the subsidiary rule of territoriality according to which the arbitration agreement is, *failing a choice of law by the parties,* governed by the law of the country where the award was made." *Id.* at 291 (emphasis added). Pertamina deduces from this innocuous general statement the unwarranted conclusion that the parties here chose Switzerland as the place of arbitration, but designated Indonesian procedural and substantive law to apply.

Article 13.2(d) of the JOC and § 8.2(d) of the ESC relate to post-award procedures, namely, a waiver of right to appeal an award to any court, not the conduct of the arbitration. The other two provisions cited by Pertamina refer to Indonesian arbitration law: one clause expressly *excludes* application of a

provision of Indonesian law (JOC Article 13.2(a) and ESC § 8.2(a)), and one expressly *includes* application of a provision of Indonesian law (JOC, Article 13.2(b) and ESC, Ex. 2, § 8.2(b)). These provisions demonstrate that the parties intended to assume control over certain arbitration procedures as a matter of contract, whether or not those procedures would otherwise be applicable as a matter of law. The presence of those provisions in the contract is not evidence of the parties' choice of Indonesian arbitral law as a whole to govern the arbitration. Rather, these provisions demonstrate merely that the parties sought to avoid speculation or later argument about the effect of those provisions. Given the extensive detail of the parties' contracts, and the enormity of the Project-related finances, the parties-had they in fact desired-could have included a provision specifically incorporating Indonesian arbitral law despite the arbitration situs in Switzerland. Had they done so, they would have altered the standard territorial rule on applicable arbitral law. The parties did not do so. Pertamina's *post hoc* and forced construction of the contracts to serve its current purposes is not supported by the contractual language to which the parties are bound.

Pertamina insists, on the one hand, that the intent of the parties must be gleaned only "from the contractual language on which they agreed at the time of contracting." Pertamina's Reply, at 34. The Court agrees that this principle of contract law applies. Nevertheless, Pertamina provides the Affidavit of G.A.S. Nayoan, the Exploration and Production Director of Pertamina, who was the principal negotiator of the contracts for Pertamina

(Ex. 76 to Pertamina's Rule 60(b) Motion) as evidence of the parties' intent.[4] Under basic contract construction principles, endorsed by Pertamina as indicated, Nayoan's Affidavit constitutes parol evidence that is inadmissible to vary the unambiguous terms of the contracts. *See, e.g., Norfolk Shipbuilding & Drydock v. Seabulk*, 274 F.3d 249, 254 (5th Cir.2001); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 320 (5th Cir.1991). Moreover, Nayoan's self-serving Affidavit is insufficient to create a genuine issue of material fact as to the meaning of the contracts in light of Pertamina's many written, post-dispute submissions and conduct evidencing a contrary intent.

Pertamina argues that its statements and actions in litigation are immaterial and that no judicial estoppel arises from them. The Court already has found that the parties' contracts, as written, demonstrate that the parties contracted for the application of Swiss arbitral law. The post-contract factual record concerning Pertamina's conduct

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[4] Gautama's opinion that "the parties intended to invoke the non-excluded provisions of Indonesian law as the governing law of their arbitral proceedings" (Ex. F to Pertamina's Rule 60(b) Motion, ¶ 13), as well as van den Berg's opinion that "it was the parties' clear intention to choose Indonesian arbitration law" (Supplemental van den Berg Opinion, Ex. P to Pertamina's Rule 60(b) Motion), are inadmissible. They are not proper expert opinions; these opinions do not represent conclusions based on technical or specialized knowledge. They are, instead, parol evidence offered on factual matters. These opinions invade the Court's province to interpret the parties' contracts as a matter of law. Moreover, these witnesses have no personal knowledge of the contract negotiations, even if such matters were admissible.

corroborates the Court's findings made above regarding Pertamina's intent at the time of contracting with KBC. The Tribunal issued the Arbitral Award in favor of KBC in December 2000. On February 1, 2001, Pertamina filed a proceeding to nullify the Award in the Swiss Supreme Court. This act of seeking nullification from the Swiss courts, not the Indonesian court, demonstrates as a factual matter that Pertamina intended Swiss arbitral law to apply and believed that the parties had agreed to Swiss arbitral law under their contracts. Pertamina reinforced its view in this regard through its repeated efforts to resuscitate the Swiss proceeding after the April 24, 2001 dismissal by the Swiss Supreme Court for failure to timely pay filing costs.

Meanwhile, on February 22, 2001, KBC filed this action seeking confirmation of the Arbitral Award. Pertamina participated fully in this case. After the Swiss court issued its final ruling in August 2001,[5] this Court issued, on December 4, 2001, its decision granting KBC's motion for summary judgment confirming the Arbitral Award and the Final Judgment in favor of KBC. Pertamina appealed the Final Judgment, but did not file a supersedeas bond to stay execution on the judgment. Belatedly, on March 14, 2002, approximately *fifteen months* after entry of issuance of the Arbitral Award, *eight months* after the Swiss court's dismissal of its appeal, and *over three months* after entry of Final Judgment in this case, Pertamina filed an annulment action in Jakarta, Indonesia, challenging the Arbitral Award

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[5] On August 7, 2001, the Swiss Supreme Court declined to reconsider its decision and the dismissal became final.

and seeking an injunction and penalties against KBC's enforcement of that Award.

Pertamina attempts to explain its failure to initially and timely seek relief from the Indonesian court. Pertamina states that under Indonesian law the action could not be filed until after the Arbitral Award was registered in Indonesia, which required several procedural steps and did not take place until March 8, 2002. However, Pertamina never asserts when it began the steps to register the Award in Indonesia. Pertamina does not, in its many detailed and extensive submissions, provide any proof that it began this process promptly after the Award was issued in December 2000. Pertamina also fails to explain why it took such an extended period of time to register the Arbitral Award. Pertamina merely makes the unpersuasive, vague assertion that it commenced annulment proceedings in Indonesia "as early as was practicable" and that it "was able to cause the Award to be registered" as soon as it fulfilled the necessary procedural requirements.[6] This limited recitation stands in stark contrast to the fact that Pertamina promptly filed a proceeding challenging the Arbitral Award in Switzerland and argued strenuously for delays of proceedings before this Court pending the outcome of the Swiss proceeding. Pertamina never sought from this Court any delay pending an Indonesian action. This conduct is inconsistent with and belies Pertamina's current posture that KBC and Pertamina intended at the time of contracting that Indonesian courts have

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[6] Pertamina's Memorandum in Support of Rule 60(b) Motion, at 10.

primary jurisdiction to annul the Arbitral Award.

Moreover, Pertamina's original interpretation of its contracts with KBC was in evidence when Pertamina repeatedly represented to the Tribunal that Swiss arbitral law applied to the arbitration. In its January 10, 1999 "Memorial Regarding Preliminary Issues" submitted to the Tribunal, Pertamina stated "Reference to Swiss Law supports this conclusion. As a result, arbitration proceedings under both contracts are governed by Chapter 12 of the Swiss Private International Law Statute."[7] The Tribunal relied on Pertamina's urging of Swiss arbitral law in making the Award. *See, e.g.*, Preliminary Award in an Arbitration Procedure Under the UNCITRAL Arbitration Rules, September 30, 1999, § B(1) ("The Respondents support this conclusion by making reference to Swiss law as the JOC and the ESC provide for UNCITRAL Arbitration in Geneva between the parties which are neither Swiss nor Swiss resident. As a result, and under both contracts, the arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes. Under Swiss law, [Respondent contends] the Arbitral Tribunal is lacking jurisdiction because KBC failed to comply with the contractual prerequisites to arbitration.");

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[7] Ex. 23 to KBC's Motion for Summary Judgment, at 27. *See also id.* at 28 ("Indeed, the Swiss Courts have required that parties strictly adhere to the precise terms of their arbitration agreement"); *id.* at 33 ("The arbitrators do not, under the arbitration agreements and the Swiss law in force at the seat of arbitration, have the power ..."); *id.* at 38 ("It would be subject to setting aside in Switzerland under Articles 179 and 190 of the Swiss PIL").

id. § C(1) ("The Respondents also state that, under the arbitration agreements and Swiss law, the arbitrators have no power to consolidate ..."); *id.* § C(3) (citing the "famous Westland Case" of the Swiss Federal Tribunal in support of its decision that a consolidated arbitration was appropriate); *id.* § D(1) (Respondents contend "such solution is not acceptable under the applicable Swiss law").

In asking this Court to stay this action pending its appeal to the Swiss Supreme Court, Pertamina reiterated its belief that the parties had agreed to Swiss arbitral law. Pertamina stated: "The arbitration award ... was conducted subject to the arbitration laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland ... KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration."[8] These representations are strong

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[8] Respondent Pertamina's Motion for Stay Pending Resolution of Swiss Appeal and Memorandum in Support [Doc. # 13], at 1. *See also id.* at 6 ("it is fundamental that the courts of the originating nation are in the best position to pass on issues under their own law ... Here, Pertamina's appeal encompasses questions of Swiss law"); Respondent Pertamina's Memorandum in Opposition to KBC's Motion for Summary Judgment [Doc. # 29], at 34-35 ("By adopting an arbitral procedure that resulted in such a disparate outcome, the tribunal thus exceeded its authority and failed to accord the parties equal treatment in direct contravention of the procedural law governing this arbitration. *See* RLA 1, Swiss Private International Law Statute ('PIL'), Article 182(3) ('the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure'); UNCITRAL Arbitration Rules, LA-6, Article 15 (requiring that parties 'are to be treated with equality and that

circumstantial evidence that Pertamina intended, at least until March 2002, Swiss arbitral law to apply. These representations also are strong acknowledgments by Pertamina that in fact the governing arbitral law was that of Switzerland.[9]

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at any stage of the proceedings each party is given a full opportunity of presenting its case.'). Neither the UNCITRAL Arbitration Rules nor the Swiss Private International Law Statute provide for non-consensual consolidation of arbitration disputes."); Pertamina's Answer to Petition [Doc. # 8], at 9 ("the applicable laws and treaties governing international arbitration give courts of the arbitration situs, here Switzerland, authority to vacate such awards"); Joint Discovery/Case Management Plan [Doc. # 11], at 2 ("the arbitration KBC seeks to confirm was rendered in Geneva, Switzerland, and is subject to Swiss arbitration law (and Indonesian substantive law). Pertamina has filed with the Swiss Supreme Court an appeal of the arbitration award.").

[9] In addition, Pertamina's comments to the Court and the Tribunal support the imposition of judicial estoppel. Judicial estoppel is a matter of federal procedure governed by federal law. *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 600 (5th Cir.1996). Application of judicial estoppel rests in the Court's discretion. *Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir.2000). Judicial estoppel is "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir.1999) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988)); *Hall v. GE Plastic Pacific PTE, Ltd.*, 327 F.3d 391, 396 (5th Cir.2003); *Ahrens*, 205 F.3d at 833. Most courts have identified two limitations on the application of judicial estoppel: (1) the position of the party to be estopped must be clearly inconsistent with a prior position, and (2) the court must have accepted the prior position. *Coastal Plains*, 179 F.3d at 206;*Ahrens*, 205 F.3d at 833. Judicial acceptance means only that the court has adopted the position urged by a party, *either as a preliminary matter* or part of a final disposition. *Coastal Plains*, 179 F.3d at 206 (emphasis added). This Court explained in its Preliminary Injunction that it relied on Pertamina's assertion that the Swiss

Pertamina further disputes KBC's contention that Swiss law forbids the application of another country's arbitral law to an arbitration conducted in Switzerland. *See* Opinion of George Friedli, Esq. (June 27, 2002) (Ex. 4 to Pertamina's Partial Stay Reply and Ex. E. to Pertamina's 60(b) Motion); Supplemental Opinion of Professor W. Michael Reisman (June 27, 2002) (Ex. 5 to Pertamina's Partial Stay Reply and Ex. M. to Pertamina's 60(b) Motion). The Court need not make a definitive ruling on this aspect of Swiss law because the Court rejects Pertamina's assertion that the parties' contracts designate the application of Indonesian arbitral law.[10]

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court was the court with authority to annul the Arbitral Award in waiting until that court had ruled before considering KBC's summary judgment motion. Specifically, the Court set the briefing schedule in this case to allow time for the Swiss court to rule. The Tribunal also relied on Pertamina's prior position. *See supra* at 13-14. It is widely held that a position taken in an arbitration can give rise to judicial estoppel. *See Speroni S.P.A. v. Perceptron, Inc.*, No. 98-2192, 12 Fed.Appx. 355, 358 n. 1 (6th Cir. June 13, 2001), and cases cited therein; *cf. Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir.1991) (an arbitration decision can have collateral estoppel or *res judicata* effect between the same parties in a subsequent proceeding). Thus, judicial estoppel does apply in this case to preclude Pertamina's current argument that Indonesia, not Swiss arbitral law applies. Pertamina's conduct reinforces this conclusion.

[10] Pertamina contends that a court in any state whose law is implicated by an award may make its own determination as to whether it has primary jurisdiction over an arbitral award. *See* ANDREAS BUCHER & PIERRE-YVES TSCHANZ, INTERNATIONAL ARBITRATION IN SWITZERLAND 29, 164 (1989) (Ex. 45 to Pertamina's 60(b) Motion). Pertamina's position appears contrary to the New York Convention's scheme

Pertamina next argues that the circumstances surrounding the negotiations of the parties' contracts evidences the parties' intent to incorporate Indonesian arbitral law. Specifically, Pertamina points to the agreements in the *Himpurna* and *Patuha* cases, in which the parties provided for arbitration in Indonesia. In those cases, the parties included the same provisions as in the JOC and ESC cited above regarding waiver or incorporation of Indonesian law. Pertamina contends that these similarities mean that the parties intended to adopt Indonesian arbitral law. Pertamina's argument falls of its own weight. What the *Himpurna* and *Patuha* cases show, if anything, is that the parties knew how to make the arbitration subject to Indonesian law if they wanted to do so. Significantly, the KBC-Pertamina JOC and ESC do not contain a key provision present in the *Himpurna* and *Patuha*

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for providing uniform rules for enforcement of international arbitration awards. Moreover, author Bucher notes that having "a double test [for determination of primary jurisdiction], *i.e.*, that of the place of arbitration and that of the law governing the arbitration, can give rise to discrepancies," for instance, "an award purporting to be made in Switzerland under German arbitration law is considered a Swiss award in Switzerland and a German award in Germany, with the result that such an award could be challenged in both countries." *Id.* The Court is unpersuaded by Pertamina's contention that Indonesia is in the "precise position" as Germany in the foregoing example; the evidence simply does not support Pertamina's assertion that the arbitration here was made under Indonesian arbitration law. In any event, whatever effect a country's own determination of its primary jurisdiction might have within its own territorial boundaries, it does not follow that a second court, such as this one, is bound by another court's patently invalid exercise of primary jurisdiction.

contracts, namely, a requirement of arbitration in Indonesia. It is the choice of Switzerland as the site of arbitration that renders Indonesian arbitral law inapplicable, not the inclusion of the above quoted provisions in the JOC and ESC. In particular, the parties' choice of Switzerland as the arbitration site combined with the absence of an agreement by the parties to apply the law of a jurisdiction other than Switzerland to the arbitration makes Swiss arbitral law applicable. The choice of Indonesia as the site for the *Himpurna* and *Patuha* arbitration negates Pertamina's attempted reliance on those cases.

Article V(1)(e) of the New York Convention provides that a court should deny enforcement of an arbitral award that has been annulled or set aside "by a competent authority of the country in which, or under the law of which" the award was made. This means that a court of secondary jurisdiction, such as this one, is discouraged from enforcing an award that has been set aside by a court of primary jurisdiction. This general proposition is not controversial. However, this premise does not answer the issue presented. First, at the time of this Court's Final Judgment, no court had annulled or set aside the Arbitral Award. This fact alone distinguishes this case from most of the cases cited by Pertamina.[11]

However, even if, as Pertamina contends, a post-judgment annulment is grounds to vacate the

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[11] *See Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir.1999); *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F.Supp.2d 279 (S.D.N.Y.1999); *but cf. In re Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F.Supp. 907 (D.D.C.1996) (enforcing an arbitration award despite its annulment by an Egyptian court).

enforcement decision, the defense applies only where an arbitral award has been annulled by a court of "competent jurisdiction." Because the Central Jakarta District Court is not a court of competent jurisdiction in light of the parties' contract, the other facts presented, and the New York Convention, the Indonesian court's ruling purporting to annul the Arbitral Award has no legal effect on this Court's December 4, 2001 Final Judgment confirming that Award.[12]

Pertamina additionally argues that because the Preliminary Injunction is not a final order, the Indonesian ruling should be given precedence. This argument misses the mark. Pertamina conflates the issues raised by KBC's petition to enforce the Arbitral Award with the issues presented by the Preliminary Injunction, which relate to the propriety of Pertamina seeking a second forum for annulment of the Award. In using the term "Preliminary Injunction," the Court did not hold nor intend to suggest a lack of finality on the merits of the enforcement decision, as Pertamina argues. In fact, when KBC sought an order to restrain Pertamina's participation in the Indonesian action, and when the Court issued its Preliminary Injunction and the preceding Temporary Restraining Order, this Court's Final Judgment on the merits of KBC's claims already had been entered and was on appeal at Pertamina's instance. The Court, after due

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[12] The High Court of the Hong Kong Special Administrative Region, Court of First Instance, reached the same conclusion in its March 27, 2003 decision in the enforcement action brought by KBC in that court. *See* Doc. # 242.

consideration, rejected Pertamina's primary jurisdiction arguments in its Memorandum in support of the Preliminary Injunction issued April 26, 2002.[13] The only thing "preliminary" about these injunctions was that this Court was willing, as an accommodation to Pertamina, if requested, to consider further briefing on the propriety of the injunction. Until the Rule 60(b) Motion, Pertamina did not request such further consideration. The Court now has considered all of Pertamina's primary jurisdiction arguments *de novo* in connection with the Rule 60(b) Motion. The Court rejects Pertamina's contentions, declines to vacate its Final Judgment awarding summary judgment to KBC, and will not alter its injunction.[14] As set forth in detail above, the Court again holds that the Swiss courts have primary jurisdiction over the Arbitral Award and thus the Indonesian ruling purporting to annul the Arbitral Award is not issued by a court of competent jurisdiction. The Indonesian annulment ruling therefore is invalid and of no force and effect.

In reaching this conclusion, the Court also has considered carefully principles of finality and comity.

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[13] Although the Court recognized that Pertamina contemplated using an Indonesian annulment order as the basis for a Rule 60(b) motion, the Court anticipated that the Preliminary Injunction would forestall any Indonesian annulment order until the Court decided the propriety of Pertamina's seeking that relief at the time it did.

[14] The Court does not base its decision on the *res judicata* effect of its Preliminary Injunction or on a finding that Pertamina's current Rule 60(b) Motion is itself a violation of the Preliminary Injunction. Therefore, it is not necessary to discuss the expert report of Geoffrey C. Hazard, Jr., Ex. T to Pertamina's Rule 60(b) Motion.

These principles do not militate in favor of the Indonesian annulment obtained through Pertamina's circumvention of the New York Convention and by forum shopping until a court ruled in its favor. Indeed, it is Pertamina that has failed to recognize the finality of this Court's prior judgment, which was entered after Pertamina's full participation in this action and after the Swiss Supreme Court rejected Pertamina's appeal under the arbitral law applicable to the parties' arbitration. Respect for foreign judicial systems is an important consideration in cases under the New York Convention. *See Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz,* 311 F.3d 488, 498-99 (2d Cir.2002). The interests of finality and comity are best served by enforcing this Court's Final Judgment confirming the Arbitral Award.

Pertamina's further argument that KBC has waived any objection to the jurisdiction of the Indonesian court by defending itself before that court and filing an appeal of the annulment ruling is without merit. The cases of *Hanes Supply Co., Inc. v. Valley Evaporating Co.,* 261 F.2d 29, 35 n. 7 (5th Cir.1958), and *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Café,* 566 F.2d 861, 863 (2d Cir.1977), cited by Pertamina, deal with a party's waiver of an objection to personal jurisdiction by appearing in an action, and have no application here.[15] Moreover, Pertamina is not entitled to the

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[15] This is a unique case, substantively and procedurally. Pertamina's citation to the Restatement (Second) of Conflict of Law and Restatement (Third) of Foreign Relations regarding recognition of foreign judgments where the issue of personal jurisdiction has been fully litigated in the foreign jurisdiction

benefit of the equitable principle of waiver. The case in Indonesia was initiated by Pertamina after it had fully litigated its positions in the Courts of the United States. Pertamina exerted only superficial effort to comply with this Court's Temporary Restraining Order and Preliminary Injunction. The Court will not penalize KBC for defending itself against Pertamina's aggressive and questionable tactics.

This Court's Preliminary Injunction ruling and its ruling today are not intended to disparage the courts of Indonesia. The Court pointedly has directed its admonishments to the conduct of Pertamina, a party subject to its jurisdiction, not to criticize Indonesian courts.[16]

III. CONCLUSION AND ORDER

Because the Arbitral Award was made under the arbitral law of Switzerland, the Court rejects Pertamina's contention that the December 4, 2001 Final Judgment in this case must be vacated because

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also are inapposite. Indeed, § 482(2)(a) of the Restatement (Third) of Foreign Relations provides that "a court in the United States need not recognize a judgment of the court of a foreign state if: (a) the court that rendered the judgment did not have jurisdiction of the subject matter of that action." Likewise, Pertamina's reliance on cases recognizing the decision of another court's jurisdictional ruling based on full faith and credit is misplaced. The Indonesian court's, and this Court's, jurisdiction is governed by the specific provisions of the New York Convention.

[16] This Court does not and has not in any way credited or relied on KBC's assertions that the Indonesian courts are not an appropriate forum because they are biased or corrupt.

of the August 7, 2002 annulment of the Arbitral Award by the Central District Court of Jakarta, Indonesia. It is therefore

ORDERED that Pertamina's Rule 60(b) Motion is **denied in part** to the extent it seeks relief under Rule 60(b)(5) based on the August 7, 2002 ruling of the Indonesian court. It is further

ORDERED that all other aspects of Pertamina's Rule 60(b) Motion are **retained under advisement** and will be the subject of a future Memorandum and Order from this Court.

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

In the Matter of an Arbitration Between KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Respondent.

No. CIV.A.H 01-0634

Dec. 4, 2001

Kenneth S. Marks, Susman Godfrey LLP, Houston, TX, Christopher F Dugan, Jones Day et al., Washington, DC, for Karaha Bodas Co., LLC.

Michael Lamar Brem, Baker Botts LLP, Houston, TX, Matthew D Slater, Cleary Gottlieb et al., Washington, DC, F Walter Conrad, Jr., Baker Botts, Houston, TX, Jonathan D Schiller, William A Isaacson, Boies & Schiller, Washington, DC, for Perusahaan Pertambangan Minyak Dan Gas Bumi Negara.

Eric Scott Lipper, Hirsch & Westheimer, Houston, TX, for Bank of America.

ATLAS, District Judge.

This action to enforce an international arbitral award is before the Court on Petitioner Karaha Bodas Company, L.L.C.'s Motion for Summary Judgment Confirming Arbitral Award ("KBC's Motion") [Doc. # 14] to which Respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") has responded.[1] Having reviewed the parties' briefs, all matters of record and the applicable authorities, the Court concludes that KBC's Motion should be **granted.**

I. *BACKGROUND FACTS*

KBC is a Cayman Islands limited liability company that contracted to develop the 400 MW Karaha Bodas Geothermal Project (the "Project") in West Java, Indonesia. Pertamina is an oil and gas corporation owned by the Government of the Republic of Indonesia and entrusted with the exploration and exploitation of geothermal resources

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[1] KBC also filed a Memorandum in Support of its Motion for Summary Judgment Confirming Arbitral Award [Doc. # 16] ("KBC's Memorandum"). Pertamina filed its Memorandum in Opposition to KBC's Motion for Summary Judgment ("Pertamina's Response") [Doc. # 29]. In addition, KBC filed a Reply [Doc. # 34] and Pertamina filed a Sur-reply [Doc. # 40]. PT. PLN (Persero) ("PLN"), was a Respondent at the arbitration and was originally named as a Respondent in this action. PLN was not served and has been dismissed from this case, [*see* Doc. # 44], pursuant to KBC's Notice of Dismissal [Doc. # 43].

and generation of electricity in Indonesia. PLN is a state-owned electric utility that supplies public electricity in Indonesia.

A. *The Project*

On November 28, 1994, Pertamina, PLN, and KBC entered into two contracts to establish their roles and obligations in the Project. Pursuant to the Joint Operations Contract ("JOC") between KBC and Pertamina, Pertamina was responsible for management of the geothermal operations and KBC was designated the contractor responsible for financing the Project and building, owning, and operating the generating facilities. *See* Petitioner's Exhibit ("PX") 2, JOC. The Energy Sales Contract ("ESC") among KBC, Pertamina, and PLN, obligated PLN to purchase from Pertamina the electricity generated by KBC's facilities for specified prices. *See* PX 3, ESC.

In almost identical provisions, both the JOC and the ESC required the parties to arbitrate any disputes in Geneva, Switzerland, pursuant to the Arbitral Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"). *See* JOC, Art. 13.2(a); ESC, § 8.2(a), at 18. Additionally, the arbitration provisions required the parties to appoint arbitrators within thirty days of a party's request to initiate arbitration. The JOC provided that "[e]ach party will appoint an arbitrator," while the ESC specified that "PLN on one hand, and COMPANY [KBC] and PERTAMINA on the other hand, will each appoint one arbitrator." *Id.* In the event that an arbitrator was not selected

within this thirty-day time frame, both contracts provided that an arbitrator would, by default, be appointed by the Secretary General of the International Center for Settlement of Investment Disputes ("ICSID") upon the request of any party. *Id.* The JOC and the ESC also contained virtually identical provisions limiting the parties' rights to appeal or otherwise bring legal proceedings concerning a dispute subject to the arbitration provisions. JOC, Art. 13.2(d); ESC, § 8.2(d), at 19.

The Government of Indonesia issued a Presidential Decree dated September 20, 1997 indefinitely postponing the Project. However, KBC continued development of the project based on Pertamina's and PLN's assurances that the Project suspension was temporary and would be restored. The Project was restored briefly by a Presidential Decree dated November 1, 1997, but yet another Presidential Decree dated January 10, 1998 (the "Presidential Decree") confirmed the indefinite postponement of the Project. As a result, Pertamina and PLN did not fulfill their contractual obligations to purchase the energy to be generated by KBC's facilities. In February 1998, KBC gave Pertamina and PLN notice that the Presidential Decree constituted an event of *Force Majeure* under both the JOC and the ESC. On April 30, 1998, KBC served its Notice for Arbitration.

B. *The Arbitration Proceedings*

In the Notice of Arbitration, KBC appointed

Professor Piero Bernardini[2] to serve as an arbitrator. Pertamina, however, did not designate an arbitrator in the allotted time of thirty days or thereafter. Nor did Pertamina contest KBC's selection at that time. By letter dated June 2, 1998, KBC notified the ICSID of Pertamina's inaction and requested the appointment of a second arbitrator pursuant to the default appointment provisions of the contracts. *See* PX 8. The ICSID questioned KBC concerning the consolidation of disputes under the JOC and the ESC and KBC's unilateral appointment of an arbitrator, and KBC responded by letter dated June 22, 1998. *See* PX 10. The ICSID confirmed receipt of the June 2 and June 22 letters. PX 11. In a June 29, 1998 letter to all parties, the ICSID recapped the prior correspondence, noted Respondents' failure to respond, and expressed its intent to grant KBC's request to appoint the second arbitrator. *See* PX 12. The ICSID also provided to the parties at this time the name of Dr. Ahmed El-Kosheri and his accompanying curriculum vitae,[3] and requested that any objections to the appointee be proffered by July 13, 1998. The ICSID sent all the preceding correspondence to PLN by courier and to Pertamina by fax and courier. *See* PX 15. Respondents did not object or respond to the potential appointment.[4] On

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[2] Prof. Bernardini was at the time Vice Chairman of the International Chamber of Commerce's International Court of Arbitration ("ICC") and Member of the London Court of International Arbitration. KBC's Memorandum, at 6-7.

[3] Dr. El-Kosheri was also a Vice Chairman of the ICC. KBC's Memorandum, at 7.

[4] KBC responded to the ICSID on July 1, 1998 (with copy to Respondents) that it had no objection to the appointment of Dr. El-Kosheri. *See* PX 13. The ICSID confirmed receipt of KBC's

July 13, 1998, having received no communications from Respondents, the ICSID notified them of its intent to appoint Dr. El-Kosheri, *see* PX 16, and made the appointment on July 15, 1998, copying all parties, *see* PX 17. Dr. El-Kosheri accepted the nomination on July 16, 1998. *See* PX 18. Pursuant to the JOC and the ESC, the two appointed arbitrators selected Mr. Yves Derains as Chairman of the arbitration panel (the "Tribunal"), and duly notified the parties. *See* PX 19.

Before proceeding on the merits of the case, PLN requested that the Tribunal first consider certain preliminary issues. *See* PX 21. The Tribunal heard the parties on these preliminary issues on November 19, 1998. Following the hearing, PLN and Pertamina, represented jointly by the same lawyers, submitted a joint memorial, *i.e.*, a memorandum, contending that KBC had improperly attempted to consolidate claims against different parties arising under separate agreements or putative agreements and that the Tribunal had been improperly constituted as the result of (1) the nature of a multi-party arbitration and (2) KBC's failure to honor the arbitrator nomination provisions of the ESC. *See* PX 23, Respondents' Memorial Regarding Preliminary Issues. Respondents participated in further argument on their preliminary objections at a hearing on May 31, 1999.

On October 4, 1999, the Tribunal issued a

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correspondence on July 2, with copies to Respondents. *See* PX 14. On July 10, the ICSID again forwarded the correspondence to Pertamina. *See* PX 15.

unanimous Preliminary Award, which held, in pertinent part, that: (1) the Tribunal was properly constituted; (2) KBC was entitled to file its claims, based on the J[illegible] and the ESC, in a single arbitration; and (3) [illegible]e Government of Indonesia was not a proper party to the arbitration. *See* PX 28, Preliminary Award, at 34.

KBC, after a brief extension of time, filed its Revised Statement of Claim on November 24, 1999. Thereafter, Pertamina and PLN sought, and were granted, a series of extensions to file a response to KBC's Revised Statement of Claim. The Tribunal also granted Respondents' March 6, 2000 joint request for a further extension to accommodate their change of counsel. Ultimately, pursuant to an agreement of the parties that was memorialized in Procedural Order No. 4, KBC filed a Revised Statement of Claim and First Memorial supplementing its claims on November 24, 1999; Respondents submitted a Reply and First Memorial on April 7, 2000; KBC submitted a Rebuttal and Second Memorial ("Rebuttal") on May 8, 2000; and Respondents submitted a Rejoinder to KBC's Rebuttal and Second Memorial on June 9, 2000. Procedural Order No. 4 set the hearing on the merits for June 19 through June 30, 2000. *See* PX 38.

Pertamina and PLN sought a further continuance and additional discovery after being served with KBC's Rebuttal, which they claimed contained new assertions and "significant elements of its case in chief" that had not previously been revealed. The Tribunal denied their requests. Further, the Tribunal determined that any adjustment to the

proceedings, that could be necessary, would be decided at the end of the hearing. PX 57.

The hearing on the merits began June 19, 2000 and closed on June 23, 2000. The hearing resulted in a transcript of over 800 pages reflecting extensive argument of counsel and live testimony from seven witnesses. Written witness statements were also submitted by the parties. The Tribunal noted that at the conclusion of the hearing, counsel "declared that they waived their respective requests for discovery," and confirmed that they had no objection beyond those already stated as to the conduct of the proceedings. PX 71, Final Award, at 12; *see* Transcript of Arbitration, Vol. V, at 807-08, 814. Post-hearing briefs were submitted on August 7, 2000. PX 71, Final Award, at 13.

On December 18, 2000, the Tribunal issued its Final Award which held that Pertamina and PLN had breached the ESC and that Pertamina had breached the JOC. *Id.* at 24, 47. The Tribunal reasoned that Respondents contractually assumed the risk of the harm created by the Presidential Decree. *Id.* at 19-20. Further, the Tribunal awarded KBC $111,100,000 to recoup its expenditures on the Project, $150,000,000 in future lost profits, and $66,654.92 in costs and expenses, plus four percent interest from January 1, 2001, until the date of full payment. *Id.* at 47.

KBC seeks enforcement of the Final Award in this proceeding pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 ("New York Convention"),

codified at 9 U.S.C. § 201 *et seq.*

II. *STANDARD OF REVIEW*

The parties agree that the recognition and confirmation of international arbitral awards is governed by the New York Convention. *See* 9 U.S.C. § 201; *Schlumberger Tech. Corp. v. United States,* 195 F.3d 216, 217 (5th Cir.1999). "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Imperial Ethiopian Gov't v. Baruch-Foster Corp.,* 535 F.2d 334, 335 (5th Cir.1976) (quoting *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). The New York Convention is formally incorporated into United States law through implementing legislation found at 9 U.S.C. §§ 201-208.

In keeping with the expeditious nature of arbitration, this implementing legislation provides for a "summary procedure" for enforcement of foreign arbitral awards. *Imperial Ethiopian Gov't,* 535 F.2d at 335. Permissible defenses are few and "the court *shall confirm* the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207 (emphasis added); *Imperial Ethiopian Gov't,* 535 F.2d at 335-36. The defenses specified in the Convention are narrowly

construed to give effect to the Convention's goal of encouraging the timely and efficient enforcement of awards. *In re Arbitration Between Trans Chem. Ltd. and China Nat'l Mach. Import and Export Corp.*, 978 F.Supp. 266, 310 (S.D.Tex.1997), *aff'd*, 161 F.3d 314 (5th Cir.1998). In short, there is a "general pro-enforcement bias" manifested in the Convention. *American Const. Mach. & Equip. Corp. v. Mechanised Const. of Pakistan, Ltd.*, 659 F.Supp. 426, 428 (S.D.N.Y.1987).

The New York convention contains only seven possible defenses. 9 U.S.C. § 201, Art. V. Recognition and enforcement of the award may be refused if the losing party furnishes proof that: (a) the parties to the agreement were under some incapacity or the agreement was invalid under the law to which the parties have subjected it; (b) the party against whom the award was invoked was not given proper notice of the appointment of the arbitrator, the arbitration proceedings, or was otherwise unable to present his case; (c) the final award deals with a difference not contemplated by the submission to arbitration or is beyond the scope of the submission to arbitration; (d) the composition of the arbitral authority or the arbitral procedure was improper and not in accordance with the agreement of the parties; or (e) the award has not yet become binding or has been stayed by a competent authority. *Id.*, Art. V(1). A court also may refuse confirmation on a arbitral award if it finds (a) the subject matter of the difference between the parties is not capable of settlement by arbitration under the law of the enforcing state or (b) enforcement of the award is or would be contrary to the public policy of the enforcing

state. *Id.*, Art. V(2).

Although it is necessary for the Court to analyze potential New York Convention defenses raised by Pertamina, "[a]bsent extraordinary circumstances, a confirming court is not to reconsider the arbitrator's findings." *Europcar Italia v. Maiellano Tours,* 156 F.3d 310, 315 (2d Cir.1998). A mistake in fact or law is insufficient to refuse confirmation of an arbitral award. *Id.* at 316.

The burden of proof in confirmation proceedings rests on the party defending against enforcement of the arbitral award, in this case, Pertamina. *Imperial Ethiopian Gov't,* 535 F.2d at 336;*Empresa Constructora Contex Limitada v. Iseki, Inc.,* 106 F.Supp.2d 1020, 1024 (S.D.Cal.2000); *American Const. Mach. & Equip. Corp.,* 659 F.Supp. at 428.

III. *CONTRACTUAL WAIVER OF OPPOSITION TO ENFORCEMENT*

As a threshold matter, the Court must determine whether Pertamina agreed in the JOC or ESC to forgo any defense against enforcement of the arbitration award. KBC contends that the following language, present in both contracts, prohibits Pertamina from opposing KBC's enforcement action:
The award rendered in any arbitration commenced hereunder shall be final and binding upon the Parties and judgment thereon may be entered in any court having jurisdiction for its enforcement. The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code

of Civil Procedure neither Party shall appeal to any court from the decision of the arbitral panel and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of Law No. 1 of 1950 and any other provision of Indonesian Law and regulations that would otherwise give the right to appeal the decision of the arbitral panel. In addition, the Parties agree that neither Party shall have any right to commence or maintain any suit or legal proceeding concerning a dispute [hereunder until the dispute[5]] has been determined in accordance with the arbitration procedure provided for herein and then only to enforce or facilitate the execution of the award rendered in such arbitration. JOC, Art. 13(d); ESC, § 8(d). Pertamina contends that this provision does not constitute a waiver of its rights under the New York Convention.

Neither party has cited a case analyzing language precisely like that in the contracts at issue here. KBC relies on *In re Arbitration Between Chromalloy Aeroservices and Arab Repub. of Egypt*, 939 F.Supp. 907 (D.D.C.1996). However, the holding in that case is not precisely on point. In that case, the United States District Court for the District of Columbia found that an Egyptian ruling nullifying an arbitration award was improper because it was "the clear intent of the parties that any arbitration of a dispute arising under the Contract is not to be appealed to any court." *Id.* at 912. While *Chromalloy* supports the conclusion that language such as that quoted above constitutes a waiver of Pertamina's

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[5] The bracketed text inexplicably is absent from the JOC, but the omission does not affect the meaning.

right to appeal the arbitration award, the current proceeding is not an appeal but an enforcement action. *Chromalloy* did not address the affect of such language on a party's right to raise New York Convention defenses in opposition to an enforcement proceeding.

Pertamina cites *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 847 (6th Cir.1996), for the proposition that the contract provisions quoted above do not constitute a waiver of its defenses under the New York Convention. The contract at issue in *M & C Corp.*, provided that "[t]he arbitral award shall be final" and that the parties have "waived their right to any form of appeal." *Id.* The *M & C Corp.* court determined that notwithstanding the contractual language at issue in that case, the party against whom the award was rendered was entitled to contest the validity and enforceability of the award pursuant to the New York Convention. *Id.* The Sixth Circuit was concerned that to hold otherwise "would insulate [arbitration] judgments from judicial review even in cases involving fraud, procedural irregularities, or exertion of improper influence upon arbitrators." *Id.*

The contractual provisions at issue here are broader than the one in *M & C Corp.* in that they limit not only appeals but the "right to commence or maintain any suit or legal proceeding concerning a dispute hereunder." The Court nevertheless concludes that Pertamina is entitled to rulings on the arguments it raises. The present suit is one in which KBC seeks to enforce an arbitration award which Pertamina opposes. The necessity of a suit to enforce

the award was envisioned by the drafters of the JOC and ESC. Implicitly, the parties thus recognized the right to defend against such relief under the New York Convention. Had the drafters intended to deprive an unsuccessful party of all New York Convention defenses in an enforcement proceeding, the drafters could and should explicitly have said so.

The defenses permitted by the New York Convention ensure that arbitral awards meet minimum procedural standards for protecting the litigants' rights. The defenses recognized by the New York Convention do not permit the Court to address the merits of the dispute submitted to arbitration. *See Schlumberger,* 195 F.3d at 220. The Court concludes that Pertamina has not waived its New York Convention defenses to enforcement of the arbitral award. Thus, the Court will consider the substantive points raised by Pertamina's Response.

IV. *PERTAMINA'S NEW YORK CONVENTION DEFENSES*

Article V of the New York Convention specifies seven limited exceptions to the mandatory enforcement of foreign arbitration awards. "Absent a convincing showing that one of these narrow exceptions applies the arbitral award will be confirmed." *Trans Chem.,* 978 F.Supp. at 309; *see Yusuf Ahmed Alghanim & Sons v. Toys "R" Us,* 126 F.3d 15, 20 (2d Cir.1997). Pertamina asserts three of the enumerated New York Convention defenses here: (1) the composition and procedure of the Tribunal violated the terms of the parties' agreements (Art. V(1)(d)); (2) the Tribunal deprived Pertamina of due

process (Art. V(1)(b)); and (3) the arbitral award violates public policy (Art. V(2)(b)).

A. *Alleged Violations of the Parties' Agreements*

Article V, § 1(d) of the Convention provides a defense against confirmation of an arbitral award if the respondent can prove that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." 9 U.S.C. § 201, Art. V(1)(d). At least one district court faced with an objection to enforcement of an arbitral award based on Article V(1)(d) has concluded that because of the clear "pro-enforcement bias" of the New York Convention, it is appropriate to "set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party." *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, No. 90-0169, 1992 WL 122712, *5 (D.D.C. May 29, 1992); *American Const. Mach. & Equip. Corp.*, 659 F.Supp. at 428. The Court finds the *Hammermills* decision well-reasoned and adopts it as persuasive authority. The Court therefore holds that Pertamina must show that there is a violation of an arbitration agreement between the parties and that the violation actually caused Pertamina substantial prejudice in the arbitration.

Pertamina argues that the Final Award should not be confirmed because first, the Tribunal improperly consolidated the disputes under the JOC and ESC into one arbitral proceeding and, second,

the Tribunal was improperly constituted because KBC unilaterally chose an arbitrator in violation of the terms of § 8.2 of the ESC.[6]

1. Consolidation of KBC's Claims Under the JOC and ESC

Pertamina argues that the arbitral procedure was contrary to the parties' agreements because neither the JOC or the ESC expressly allows consolidation. Because arbitration is a product of contract, courts generally are reluctant to allow consolidation unless the parties consent. *See Government of United Kingdom of Great Britain v. Boeing Co.*, 998 F.2d 68, 72 (2d Cir.1993) (district courts do not have authority to consolidate arbitrations absent the parties consent).

In this case, the Tribunal approved a single arbitration based on the "connexity" of KBC's claims and the integration of the two contracts.[7] *See* PX 28,

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[6] KBC characterizes Pertamina's arguments as "arbitrability" issues, and argues that Pertamina cannot raise such issues here because it agreed to submit them for decision by the Tribunal. The Court disagrees. Disputes concerning breaches of the contracts are encompassed by the contracts' arbitration clauses. To the extent that Pertamina raises issues as to whether the arbitration procedures were in accordance with the parties' agreements, these matters are not strictly arbitrability questions. However, KBC's contention that these contract issues were fully aired before the Tribunal is well-taken. Absent some clear reason under the New York Convention, the Court will enforce the Tribunal's award.

[7] "Connexity," as explained in the Preliminary Award, relates to the legal relations between KBC and Pertamina on the basis of the JOC on the one hand, and between KBC, Pertamina and

Preliminary Award, at 26. The Tribunal found that "the parties did not contemplate the performance of two independent contracts, but the performance of a single project consisting of two closely related parties." *Id.* at 27. The Tribunal had "not the slightest doubt" that a single arbitration was appropriate due to the integration of the two contracts and the fact that the Presidential Decree, the consequences of which are at the origin of the dispute, affected both of them. *Id. Compare United Kingdom,* 998 F.2d at 69 (reversing district court consolidation of arbitration proceedings involving separate, distinct agreements between the United Kingdom and two different parties, absent the parties' agreement).

The Tribunal based its integration finding on the facts that the contracts were signed on the same day; that the JOC expressly provided that the ESC "shall be an integral part of this contract, and to the extent the provisions of the Energy Sales Contract obligate the Parties hereto, shall be deemed incorporated into this contract for all purposes"; and that the ESC provided that it and the JOC together constitute the entire agreement between the parties. PX 28, Preliminary Award, at 26-27. In essence, the Tribunal concluded that the nature of the contracts at issue is such that the parties contemplated arbitration in a single proceeding. This Court strongly concurs. In addition, it is obvious that separate arbitrations of the matters in dispute among the parties under the JOC and ESC would

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PLN on the basis of the ESC on the other hand. PX 28, Preliminary Award, at 26.

have required substantial duplication of evidence on liability, damages and defensive issues. Pertamina, the only Respondent in this enforcement proceeding,[8] is a party to both the JOC and the ESC. The two Respondents in the arbitration, Pertamina and PLN, were represented by the same counsel at all times during the arbitration. Further, Pertamina has not cited any case in which consolidation was deemed to be in error under similar circumstances.[9]

The Tribunal acknowledged that "the position of each party has to be considered independently when discussing the substance of the case, on the basis of their respective legal and contractual situations" (*Id.* at 28), and carefully adhered to this precept in all its rulings. There is no evidence that the Tribunal failed to distinguish between the positions of Pertamina and PLN in the arbitration. Indeed, the Tribunal

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[8] *See supra* note 1.

[9] One treatise, cited by Pertamina in support of its argument that there can be no consolidation absent consent, acknowledges "there is strong support for the view that a judicially consolidated arbitration would be enforceable under the New York Convention where allowed by the governing local law as long as all parties have agreed (1) to arbitration and (ii) to the same arbitral jurisdiction. Where the parties have in effect agreed to a *lex arbitri*, it is reasonable to infer that they have agreed to be governed by any mandatory requirements of that law regarding consolidation which may override the express choice of the parties in matters of composition and procedure of the arbitral tribunal." ALLAN REDFERN, MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 187 (2d Ed.1991). In this case, the parties agreed to arbitration and that the arbitration would be conducted in Geneva, Switzerland. Thus, there is a legal foundation for the Tribunal's application of the Swiss law of "connexity" to the consolidation issue

went to great lengths to address the contentions of each separately, even though Pertamina and PLN chose to submit joint memorials and were represented by the same counsel at the arbitration hearing. There is simply no showing that these findings by the Tribunal are in error and should not be enforced.

In any event, Pertamina has not demonstrated that it suffered any loss of contract rights from the consolidation. The Court concludes that the consolidation did not violate the parties' agreements. Pertamina has not proven any prejudice from the consolidation. Pertamina thus has failed to meet its burden under the New York Convention to show a violation of Article V(1)(d) that precludes enforcement of the Final Award.

2. Appointment of Arbitrators

Pertamina also contends that the procedure used to appoint the arbitrators for the arbitration proceedings violated the ESC.

The ESC provides for the appointment of arbitrators as follows:

> PLN on one hand, and COMPANY [KBC] and PERTAMINA, on the other hand, will each appoint one arbitrator, in each case within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the

> Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes, upon the request of any Party.

ESC, § 8.2(a). The JOC's procedure for arbitrators' appointment is slightly different:

> Each Party [KBC and Pertamina] will appoint an arbitrator within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes.

JOC, Art. 13.2(a). Thus, each contract provided for the appointment of arbitrators by the ICSID in the event any party failed to meet its own obligation to do so. There is no question that the Tribunal was constituted in accordance with the express terms of the JOC. The disputed issue is whether KBC's unilateral designation of the first arbitrator violated the ESC.

The Tribunal rejected the Respondent's position that in all disputes under the ESC, KBC *and* Pertamina must jointly appoint one arbitrator while PLN appointed the other. *See* PX 28, Preliminary

Award, at 30. The Tribunal found that the ESC arbitration clause applies to the entire contract, not only to disputes aligning KBC and Pertamina on one side against PLN, and that therefore it defied common sense, in a dispute between KBC and Pertamina, to oblige KBC and Pertamina to jointly appoint an arbitrator. *See id.* Because the ESC does not expressly address the method for appointing arbitrators in the KBC v. Pertamina situation, the Tribunal found that the appointment of arbitrators must be made in accordance with UNCITRAL Arbitration Rules, which the parties incorporated into the ESC and which were satisfied in this case.[10] To the extent that the contract interpretation issue is an arbitrable one, the Court sees no reason under the New York Convention to reject the Tribunal's reasoned analysis of the ESC.

In addition, looking at the issue afresh, the Court concludes that Pertamina has not established a violation of the ESC in regard to the first (or any other) arbitrator's selection. Pertamina has not claimed, before the Tribunal or this Court, that it failed to receive KBC's April 30, 1998 Notice of Arbitration. That Notice included Prof. Bernardini as KBC's choice of arbitrator. Pertamina also has not claimed that it did not receive the ICSID's June 29

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[10] Section 8.2(a) of the ESC provides that any dispute arising under that contract "shall finally be settled by an arbitral tribunal (the "Tribunal") under the UNCITRAL arbitration rules contained in Resolution 31/98 adopted by the United Nations General Assembly on December 15, 1976 and entitled 'Arbitration Rules of the United Nations Commission on International Trade Law' as in force at the time such arbitration commenced."

and July 13, 1998 letters, *see supra,* at 4, informing Pertamina of the ICSID's intention to appoint Dr. El-Kosheri as the second arbitrator.[11] The ICSID's action thus also indicated its acceptance of Prof. Bernardini as the first arbitrator. Nonetheless, Pertamina lodged no objection to the appointment of either Prof. Bernardini or Dr. El-Kosheri.[12]

The Court also rejects Pertamina's contention that KBC's nomination of an arbitrator without Pertamina's consent violates the ESC because Pertamina's construction of the selection procedure renders the ESC's arbitration provision illusory. Under Pertamina's interpretation, Pertamina would hold the unilateral power to prevent the arbitration of disputes between it and KBC arising under the ESC simply by refusing to select or comment on KBC's proposals for an arbitrator. That is not a reasonable interpretation of the expressed intent of the parties as set forth in the ESC. The parties intended that in the event a party failed to name an arbitrator within thirty days of the request for arbitration, the ICSID would do so. In effect, that is the scenario that transpired in this case. KBC

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[11] Pertamina apparently argued to the Tribunal that it did not name an arbitrator because it was contesting the legitimacy of the arbitration and further contended that it did not receive certain of the correspondence from the ICSID regarding KBC's request that the ICSID appoint the second arbitrator. *See* PX 28, Preliminary Award, at 8. Pertamina does not assert these arguments before the Court.

[12] In fact, Pertamina expressly informed the Tribunal in its Preliminary Memorial that it had no objection to Dr. El-Kosheri, the arbitrator selected by the ICSID. *See* PX 23, at 36. Thus, Pertamina's objection is solely to fact that KBC was allowed to select one of the arbitrators.

nominated an arbitrator. Pertamina had ample notice of this act. The time for Pertamina to object to KBC's selection or for Pertamina to have asserted its right to participate in the first arbitrator's appointment was within thirty days of receiving KBC's Notice of Arbitration and arbitrator selection. In the absence of an objection from Pertamina, nothing in the ESC precluded the ICSID from accepting KBC's nomination for the first arbitrator.[13] This procedure materially complies with the terms of the ESC.[14] Pertamina's belated arguments that Prof. Bernardini was improperly selected are a futile attempt to avoid consequences of its strategic decisions not to object timely to KBC's selection and to decline to participate in the selection of an arbitrator.

Moreover, there is no evidence-and Pertamina does not even allege-that Prof. Bernardini, the KBC-selected arbitrator, was biased against Pertamina.

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[13] It is noted that Pertamina still lodged no objection to either the first or the second individual appointed arbitrator.

[14] There are other viable interpretations of the ESC arbitration clause and the parties' contracts generally that support the procedure used in this dispute. For instance, because the ESC and JOC are expressly integrated contracts, they must be interpreted together to determine the intent of the parties. It is arguable that the parties to the ESC intended to be bound by the arbitration provision (including the provision for the selection of arbitrators) of the JOC when a dispute involved that contract. Under that interpretation, the arbitration provision of the ESC would be operative only in the event the arbitration did not include issues arising under the JOC. Alternatively, the contract provisions may be harmonized by applying the ESC methodology only when KBC and Pertamina both were adverse to PLN and not to each other.

Indeed, to the extent Pertamina must show prejudice from the contract violation to support this New York Convention defense, Pertamina's evidence fails even if one assumes that Prof. Bernardini unfairly favored KBC in the arbitration. All the findings and awards were unanimous. *See* PX 28, Preliminary Award; PX 71, Final Award. There is no evidence or even any allegation that the other two arbitrators were not neutral, were biased, or had any conflict of interest. Therefore, Pertamina cannot show that the arbitration selection procedure worked any prejudice to Pertamina. *See Compagnie des Bauxites de Guinee,* 1992 WL 122712, at *5.

The Court accordingly holds that Pertamina has not met its burden to show either that the composition of the Tribunal violated the parties' agreements or that the composition caused Pertamina substantial prejudice.

B. *Alleged Due Process Violations*

The New York Convention allows denial of award confirmation if the party against whom it is invoked can prove that it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case". 9 U.S.C. § 201, Art. V(1)(b). This enumerated defense "essentially sanctions the application of the forum state's standards of due process." *Iran Aircraft Indus. v. Avco Corp.,* 980 F.2d 141, 145-46 (2d Cir.1992). The fundamental requirement of due process is the opportunity to be heard at a "meaningful time and in meaningful manner." *Id.* at 146. Enforcement of the award may be denied only if

there was a procedural infirmity that rendered the proceedings fundamentally unfair and caused prejudice to the complaining party. *Hammermills,* 1992 WL 122712, at *5. A fundamentally fair hearing is one that meets the minimum requirements of fairness: adequate notice, a hearing on the evidence, and an impartial decision by the arbitrators. *See Generica Ltd. v. Pharm. Basics,* 125 F.3d 1123, 1130 (7th Cir.1997); *Sunshine Mining Co. v. United Steelworkers,* 823 F.2d 1289, 1295 (9th Cir.1987). The right to due process does not, however, encompass the procedural rights guaranteed by the Federal Rules of Civil Procedure. *Imperial Ethiopian Government,* 535 F.2d at 337;*Empresa,* 106 F.Supp.2d at 1026;*Trans Chem.,* 978 F.Supp. at 310 ("The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By agreeing to arbitration [the respondent] subjected itself to its advantages and disadvantages.").

Pertamina argues that it was not afforded due process in the arbitration because the Tribunal (1) failed to grant a continuance and denied it further discovery six weeks before the scheduled hearing, and (2) "reversed," without notification, the Preliminary Award. The first of these alleged procedural deficiencies relates to Pertamina's alleged inability to respond adequately to issues raised in KBC's Rebuttal briefing. In connection with its arguments regarding discovery, Pertamina further asserts that it is entitled to discovery in this federal court proceeding pursuant to Federal Rule of Civil Procedure 56(f) before the Court rules on KBC's summary judgment motion. The second alleged

procedural deficiency relates to Pertamina's perception that the Final Award is contrary to the Tribunal's Preliminary Award, which found that the Government of Indonesia was not a proper party to the arbitration and that Pertamina could not be held liable for the acts of the Government of Indonesia. KBC contends that Pertamina received a full and fundamentally fair hearing.

1. Denial of Request for Continuance and Discovery

Tribunal's Denial of Continuance and Discovery Requests.-Six weeks before the hearing, in early May 2000, KBC filed a Rebuttal with the Tribunal. Pertamina contends that it was prejudiced by KBC's Rebuttal because KBC allegedly included an entirely new position on the financing of the Project, made new allegations of the conduct constituting Pertamina's breach, relied on newly-submitted awards in the arbitrations known as *Himpurna* and *Patuha,* identified additional witnesses, and presented new documentary evidence. Pertamina asserts that it was required to secure new experts and fact witnesses and to impose upon its existing experts and fact witnesses to review KBC's Rebuttal submissions in four weeks. Pertamina further contends it had insufficient time post-Rebuttal to prepare for the hearing.

In fact, KBC's Rebuttal did not assert any new claims or new legal theories for recovery. KBC's Rebuttal responded to specific defenses asserted in Respondents' Reply by specifying additional facts, argument, and authority supporting its claims,

including the *Himpurna* and *Patuha* awards. The Court is aware of no rule or law that obligated KBC to specify in its Revised Statement of Claim all evidence it intended to submit, and every argument it intended to make, ultimately to support its claims at the hearing. Pertamina had notice of KBC's claims, and should have anticipated that KBC would contest its defenses. The arbitration proceeding was pending for approximately two years. Pertamina had ample time to prepare its case. Moreover, the fact that KBC's Rebuttal was submitted only six weeks before the hearing was the direct result of Respondents' requests for extensions of time to submit their Reply to KBC's November 1999 Revised Statement of Claim. Pertamina was aware in mid-March 2000, when the Tribunal granted its latest request for an extension of time, that the hearing date remained set for June 19, 2000. *See* PX 38, Procedural Order No. 4. Pertamina did not file its Reply to KBC's Revised Statement of Claim until April 2000, which explains the timing of KBC's Rebuttal.

To the extent Pertamina also contends that it was unfairly denied discovery on the "highly material" issue of KBC's ability to finance the Project, the record does not support the contention. During the two years preceding the filing of the Rebuttal, Pertamina had requested no discovery on this "highly material" issue, even though KBC expressly sought lost profits in its Revised Statement of Claim in November, 1999, and even though Pertamina responded to KBC's claim by arguing that KBC was entitled to no damages because it could not have completed the Project for reasons independent of the

Presidential Decree. *See* PX 40, at 6. Moreover, even without the requested discovery, Pertamina presented substantial evidence on the Indonesian economy (information easily accessible to Pertamina and PLN), and expert opinions on the availability of financing, on the size of the "geothermal reserve," and on the "useable resource." *See* PX 39, 41, 42, 43, and 44. Pertamina's counsel thoroughly cross-examined KBC's witnesses on the issues raised in KBC's Rebuttal. Pertamina, which bears the burden to prove that the hearing was fundamentally unfair, does not identify specific topics or other matters it was prevented from raising; nor does Pertamina identify anything it would have done differently if it had more preparation time. Pertamina refers to the broad, general discovery requests attached to its letter of submission to the arbitrators, *see* PX 54, but it has not identified a single specific piece or type of evidence it believes exists that would have aided in its defense on these issues. Pertamina has failed to establish under the New York Convention that it was denied a fundamentally fair hearing, and thus denied due process, as a result of the lack of discovery or a continuance after KBC's Rebuttal.[15]

In addition, the transcript of the June 23, 2001 proceedings (the last day of the arbitration hearing) establishes that Respondents informed the Tribunal that they were satisfied with the record as it existed, and that they abandoned their pre-hearing discovery

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[15] The issue is not whether this Court would have granted the discovery or the continuance. The question is whether the procedures employed met the minimum requirements of fairness.

requests:

> MR. CHAIRMAN: May we, before departing have a discussion on what is going to be done now in these proceedings, and we see two items on this particular agenda. There were first a certain number of procedural objections which have been made before this hearing, and in the procedural order we said that this would be decided after the hearing. In summary, there was a request for discovery from one side, and there was objection to the submission of this arbitral award and the business of confidentiality. You remember this discussion.
>
> MR. MISHKIN [Respondents' Attorney]: I think there was a request for discovery from both sides.
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> MR. CHAIRMAN: Our first question is are these requests maintained, all of them, part of them, because we would like to know on what we have to decide.
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> MR. MISHKIN: May I just give you my views on that question.
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> MR. CHAIRMAN: Yes.
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> MR. MISHKIN: And that is that the purpose of discovery is to prepare for the hearing, it is not to supplement the record after the hearing. So I think the discovery requests are moot, and if discovery is now permitted, then you have to re-open the proceedings and so on. So I treated, notwithstanding the fact that it was theoretically open, I treated this request as effectively being denied, and we went forward. Our request went to the purported financial

> ability, the purported financing that would have been made available and other things, and *I think the record on that has been fully made. I am prepared to rest on that record,* and so *I think discovery requests should no longer be in the picture.*
> MR. SCHILLER [Petitioner's Attorney]: I agree.
> PROF. BERNARDINI [Arbitrator]: And you agree on their withdrawing their request. What about yours?
> MR. SCHILLER: I withdraw my request.

Hearing Transcript, Vol. V, at 807-08 (emphasis added). Thus, Pertamina expressly abandoned its arguments concerning the timing and other alleged procedural defects in the arbitration proceedings.

In any event, these procedural decisions were well within the reasonable exercise of the Tribunal's discretion. These decisions did not prevent Pertamina from having a meaningful hearing. They do not rise to the level of fundamental unfairness necessary to deny enforcement of the arbitration award.

Pertamina's Rule 56(f) Request for Discovery.-As another avenue in its due process defense under the New York Convention, Pertamina requests discovery in this lawsuit under the Federal Rules of Civil Procedure. Specifically, Pertamina requests, as it did before the Tribunal, additional discovery related to KBC's ability to finance the Project. KBC opposes Pertamina's request, contending that it is improper under applicable law

and the New York Convention, and is unwarranted factually. Pertamina's request for discovery is denied.

Rule 56(f) of the Federal Rules of Civil Procedure permits a district court, upon a proper showing by the party seeking Rule 56(f) relief, to delay consideration of a motion for summary judgment pending additional discovery. FED. R. CIV. P. 56(f); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1441 (5th Cir.1993). "In order to obtain a continuance of a motion for summary judgment for discovery purposes, a party must set forth some statement to the court indicating why additional discovery is necessary and 'how additional discovery will create a genuine issue of material fact.' " *Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 445 (5th Cir.2001) (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 28 F.3d 1388, 1395 (5th Cir.1994)). A party "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." *Krim,* 989 F.2d at 1442 (internal citations omitted). It must show (1) why additional discovery is needed and (2) how that discovery will create a genuine issue of material fact. *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 535 (5th Cir.1999) (citing *Krim,* 989 F.2d at 1442). If the party has not diligently pursued discovery, however, it is not entitled to relief under Rule 56(f). *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 28 F.3d 1388, 1397 (5th Cir.1994).

Pertamina argues that this Court's review of its New York Convention defenses involves legal issues subject to *de novo* review, but concedes that the

Court must defer to the Tribunal's factual findings. Pertamina's Response, at 2. Pertamina also concedes that the grounds for review under the New York Convention typically relate to the existing record and do not otherwise depend on discovery. Pertamina's Response, at 50 (citing *Frere v. Orthofix, Inc.*, Nos. 99CIV4049 and 00CIV1968, 2000 WL 1789641, at *4-*8 (S.D.N.Y. Dec.6, 2000)). Discovery is particularly inappropriate in enforcement proceedings under the New York Convention. *See Imperial Ethiopian Gov't*, 535 F.2d at 337 ("the loser in arbitration cannot freeze the confirmation proceedings in their tracks and indefinitely postpone judgment by merely requesting discovery.").

As noted above, the right to due process protected by the New York Convention does not encompass the procedural rights guaranteed by the Federal Rules of Civil Procedure. *See Imperial Ethiopian Government*, 535 F.2d at 337;*Empresa*, 106 F.Supp.2d at 1026;*Trans Chem.*, 978 F.Supp. at 310 ("The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By agreeing to arbitration [the respondent] subjected itself to its advantages and disadvantages."). Pertamina had notice at least as early as November 24, 1999, upon KBC's submission of its Revised Claim, that KBC was seeking lost profits.[16] *See* PX 31, Revised Statement, at 37.

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[16] In its Notice of Arbitration, KBC claimed it was seeking damages from PLN and Pertamina for breach of both the JOC and ESC. *See* PX 6, Notice of Arbitration, ¶ 17(A). It was apparent at that point that KBC's ESC claim likely would include lost profits, and thus raised the issue of financing,

Indeed, the issue of available financing was raised and thoroughly addressed by Pertamina, without the benefit of any discovery, in its Reply to KBC's Revised Statement, *see* PX 40, Respondents' Reply, at 6, and through witness statements. There is no reason to allow the discovery Pertamina requests at this enforcement stage of the proceedings.

Finally, the Court's conclusion that the requested discovery is unwarranted at this stage is supported by statements of Pertamina's counsel at the conclusion of the arbitration hearing. Counsel stated that "discovery is to prepare for the hearing, it is not to supplement the record after the hearing" and that Pertamina's discovery request "went to the purported financial ability, the purported financing that would have been made available and other things, and I think the record on that has been fully made. I am prepared to rest on that record, and so I think the discovery requests should no longer be in the picture." Hearing Transcript, Vol. V, at 807-08.

Even if discovery were appropriate at this late stage in the parties' dispute, and even if the Tribunal made a factual or legal error, Pertamina has failed to meet its Rule 56(f) burden to demonstrate why the requested discovery is material. This Court may not disturb the Tribunal's ruling absent a due process violation, or other ground under the New York Convention. Pertamina has failed to show that the evidence that could be discovered likely would lead to a finding that the arbitration process was

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because the ESC contemplated that the Project would be completed and electricity sold to PLN.

fundamentally unfair, constituted a due process violation for some other reason, or violated the New York Convention in some other way. Thus, Pertamina's discovery request under Rule 56(f) is denied.

In sum, Pertamina has failed to meet its burden to show that circumstances warrant opening the record for additional evidence in this enforcement proceeding. Thus, the Court rejects Pertamina's request for discovery and its argument that KBC's motion for summary judgment is premature.

2. "Reversal" of the Preliminary Award

Pertamina contends that it was denied due process when the Tribunal found it liable for abiding by the requirements of the Presidential Decree despite having determined in the Preliminary Award that a "Government Related Event" is "not deemed to be a breach of contract by Pertamina or PLN but a Force Majeure event excusing KBC's non-performance." PX 28, Preliminary Award, at 19. Further, Pertamina contends that because the Tribunal explicitly stated that the matters to be considered at the hearing on the merits were to be "issues not resolved in this Preliminary Award," it did not have notice that it would be held liable for breach of contract. Pertamina's position misinterprets both the Preliminary Award and the Final Award, and defies logic. The Preliminary Award found that the Government of Indonesia was not a party to the contracts and that Pertamina was not the alter-ego of the Government. However, it expressly recognized that Pertamina *would* bear the

risk of loss arising from a Government Related Event:

> [T]he parties took care of the close relation of PERTAMINA and PLN with the [Government]. They included in both contracts a definition of "Government [R]elated Event" and, in both contracts, the Force Majeure clause indicates that a "Government [R]elated Event" is an event of Force Majeure with respect to KBC only. This has two consequences for the interpretation of the parties' intention. On the one hand, they were acknowledging that PERTAMINA and PLN had such a close relation with the GOI that a decision of the latter was not a Force Majeure event for them; on the other hand, they were confirming that the [Government] was not a party to the contracts since a governmental decision which prevents KBC to perform its obligations is not deemed to be a breach of contract by PERTAMINA or PLN but a Force Majeure event excusing KBC's non performance.

Id.

In the Final Award, the Tribunal found that Pertamina had a contractual responsibility to make KBC whole for a "Government [R]elated Event," not that the Presidential Decree constituted a breach of contract by Pertamina. The Tribunal stated:

> [The Preliminary Award] was not meant to express any view as to the consequences for

> PERTAMINA or PLN of a Governmental decision which prevents the performance of the Contracts. Contrary to Respondents' point of view, the fact that they are not responsible for the Governmental decision to prevent the performance of the Contracts does not exempt them from liability if they do not perform their own obligations in abiding by the decision. The Governmental decisions, in this case the Presidential Decrees n. 39/1997 and n. 5/1998, do not amount to a breach of Pertamina's and PLN's obligations. However, since a Governmental event is not a Force Majeure event for them, their non-performance has no legitimate excuse and must be considered as a breach of contract.
>
> Such distinction is far from being artificial, as the Respondents contend. It applies each time a party is actually prevented from performing its contractual obligations by an event which it cannot invoke as Force Majeure due to the existence of provisions to that effect in the contract or by application of the law.

PX 71, Final Award, ¶¶ 56-57.

Moreover, the Preliminary Award must be read in context with the Notice of Arbitration and all subsequent pleadings by claimant KBC and Respondents. KBC clearly and directly sought relief for alleged breaches of contract. In these circumstances, if Pertamina truly thought the Preliminary Award eliminated its liability for non-performance, then there was nothing left to

arbitrate. At the very least, Pertamina had ample notice that the Tribunal would be hearing all of the matters addressed in KBC's Revised Statement of Claim, submitted *after* the Preliminary Award and approximately seven months before the hearing on the merits. Pertamina responded to those claims in its briefing to the Tribunal and thus demonstrated its awareness at the time of the matters in issue. Pertamina's self-serving, erroneous interpretation of the Preliminary Award, does not support a finding that the arbitration was fundamentally unfair. Indeed, Pertamina has failed to demonstrate that the Tribunal's own interpretation of its order is in any way unfounded.

C. *Alleged Violations of Public Policy*

The Convention allows confirmation of an award to be refused if "the recognition or enforcement of the award would be contrary to the public policy of that country." 9 U.S.C. § 201, Art. V(2)(b). Pertamina asserts that the Final Award is contrary to United States public policy because it (1) violates the internationally recognized doctrine of "abuse of rights" by awarding lost profits to KBC; and (2) holds Pertamina liable for refusing to violate governing Indonesian law.

Application of the public policy exception will succeed in only the narrowest of circumstances; indeed, vacating an arbitral award under this defense requires a violation of the "most basic notions of morality and justice." *Slaney v. Int'l Amateur Athletic Fed'n,* 244 F.3d 580, 593 (7th Cir.2001) (quoting *Fotochrome, Inc. v. Copal Co.*, 517

F.2d 512, 516 (2d Cir.1975)); *see also Europcar,* 156 F.3d at 315;*Industrial Risk Ins. v. M.A.N. Gutehoffnungshutte GmbH,* 141 F.3d 1434, 1445 (11th Cir.1998); *Parsons & Whittemore Overseas, Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA),* 508 F.2d 969, 974 (2d Cir.1974). The award must violate an "explicit public policy that is well-defined and dominant ... [and is] ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests." *Industrial Risk Ins.,* 141 F.3d at 1445 (quoting *Drummond Coal Co. v. United Mine Workers, Dist. 20,* 748 F.2d 1495, 1499 (11th Cir.1984) (internal quotes deleted)).

1. Does The Lost Profits Award Constitutes An "Abuse of Rights"?

The international "abuse of rights" doctrine put forth by Pertamina in its defense of enforcement of the Final Award is akin to America's "good faith" principle of law. Joseph M. Perillo, "*Abuse of Rights: A Pervasive Legal Concept,*" 27 PAC. L.J. 37, (Fall 1995). Actions constitute an abuse within the scope of the doctrine if: "(1) the predominant motive for the action is to cause harm; or (2) the exercise of a right is totally unreasonable given the lack of any legitimate interest in the exercise of the right and its exercise harms another; or (3) the right is exercised for a purpose other than that for which it exists." JOHN D. CALAMARI AND JOSEPH M. PERILLO, THE LAW OF CONTRACTS, § 11.39 (4th 1998).

In asserting the "abuse of rights" doctrine, Pertamina does not argue that lost profits are never

a legitimate form of damages for breach of contract, but that an award of lost profits in this particular case, when KBC never finished construction on the Project and the Indonesian economy was in ruins, constitutes an abuse of rights in violation of United States public policy.

First, Pertamina falls far short of meeting its burden to show that the "abuse of rights" doctrine is well-defined and dominant in United States law. Pertamina has not cited a single case holding that "abuse of rights" is a recognized doctrine in the United States or applying that doctrine to avoid enforcement of a contractual right. However, even assuming for purposes of the instant motion that "abuse of rights" is an accepted legal doctrine in this country, the facts of this case, as found by the Tribunal, do not meet the elements of an "abuse of rights" as set forth by the authority relied upon by Pertamina. There is no evidence, and thus can be no finding, that KBC's primary motivation was to cause harm to Pertamina or the Indonesian People; that KBC lacks a legitimate interest in asserting its right to lost profits by virtue of its contracts with Pertamina; or that KBC was attempting to exercise its right to recover lost profits for any purpose other than being compensated for its losses caused by Pertamina's failure to perform its obligations under the contracts. The fact that KBC was awarded a substantial sum of money, and Pertamina may think that its resources are better spent elsewhere, does not satisfy the doctrine.

In arguing that the lost profits award constitutes an "abuse of rights," Pertamina cites two arbitration

awards that resulted from the same Presidential Decree that precipitated the arbitration in the instant case. *See* Petitioner's Legal Authorities ("LA") 2, Final Award dated May 4, 1999, *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara* ("*Himpurna* "); LA 3, Final Award dated June 11, 1998, *Patuha Power Ltd. v. PT. (Persero) Perusahaan Listruik Negara* ("*Patuha*"). The arbitral tribunal that decided both *Himpurna* and *Patuha* invoked the doctrine of "abuse of rights" to deny the claimants' awards of lost profits. These awards contain extensive discussion of the "abuse of rights" doctrine. *See* Pertamina's Response, at 60-64. A review of those awards reveals that the tribunal was influenced by PLN's status as "an arm of governmental policy acting in pursuit of the public welfare" that had not intentionally deprived the claimant of valuable contractual rights, and by the dire straits of the Indonesian economy.[17]

The *Himpurna* and *Patuha* Final Awards were introduced into evidence by KBC, over Pertamina's objection.[18] Pertamina contends that despite its

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[17] It is noted that Pertamina's argument to this Court, that the interests of the Indonesian public demand that Pertamina be immune from liability for lost profits, is at odds with the vigorously defended position in the arbitration that Pertamina and PLN are not the alter-egos of the Indonesian Government. In any event, it is possible that the results in *Himpurna* and *Patuha* are attributable, at least in part, to positions taken by PLN in those cases that are materially different from PLN's positions here.

[18] Pertamina's reliance on *Himpurna* and *Patuha* is also somewhat disingenuous given its argument to the Tribunal that those decisions should not be treated as precedents. PX 71, Final Award, ¶ 31.

objection to those awards, it argued for application of the "abuse of rights" doctrine detailed therein, but the Tribunal ignored the doctrine. *See* Pertamina's Response, at 60. Pertamina's arguments fail for several reasons. First, prior arbitral awards are not precedential authority for the Tribunal or this Court. *See Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 147 (4th Cir.1993).

Second, it is clear that the doctrine of "abuse of rights" was before the Tribunal, and was not "ignored."[19] The Final Award indicates that the Tribunal in reaching its conclusion considered the state of the Indonesian economy and balanced the harm to Pertamina and PLN against KBC's legitimate interest in enforcing its contractual rights. The Tribunal noted that "the worsening of the economic and political situation in Indonesia at the time has to be taken into account as regards both the conditions at which financing could have been obtained and possible delays in arranging the same." PX 71, Final Award, ¶ 133. The Tribunal further noted, "[t]here is no doubt ... that the Claimant is entitled to obtain the benefit of its bargain in

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[19] In any event, it is likely that disregard of a principle of law is not a valid basis for avoiding confirmation under the Convention. *See M & C Corp.*, 87 F.3d at 851 n. 2 ("Whatever may be meant by the manifest disregard doctrine applicable in domestic arbitration cases, it is clear that such a doctrine does not rise to the level of a violation of public policy that is necessary to deny confirmation of a foreign arbitral award."); *RAKTA*, 508 F.2d at 977 ("Both the legislative history of Art. V and the statute enacted to implement the United States' accession to the Convention, are strong authority for treating as exclusive the bases set forth in the convention for vacating an award.").

addition to recovering the expenditures it has incurred. As stated in the *Himpurna* award, '[t]o limit the recovery of the victim of a breach to its actual expenditures is to transform it into a lender, which is commercially intolerable when the party was at full risk for the amount of investments made on the strength of the contract.' " *Id.*, ¶ 122. Thus, by awarding KBC its lost profits, the Tribunal necessarily rejected the "abuse of rights" doctrine in light of the facts and arguments presented.

This Court sees no reason to revisit the merits of the Tribunal's factual findings or its Final Award in this regard. The Court concludes that Pertamina has not met its burden to establish that the award to KBC of lost profits violates public policy.

2. Does the Final Award Hold Pertamina Liable For "Obeying The Law"

Pertamina lastly contends that the Tribunal held it liable for refusing to violate governing Indonesian law. As discussed *supra* in Section IV.B.2, at 953 - 54, this contention mischaracterizes the Final Award. The Tribunal did not find Pertamina liable for refusing to break the law.[20] Rather, in the Final Award, consistent with the Preliminary Award, the Tribunal found that Pertamina had a contractual responsibility to make KBC whole for a "Government [R]elated Event." The Tribunal thus found Pertamina liable for damages based on the parties'

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[20] Nor did the Tribunal hold that the Presidential Decree constituted a breach of contract by Pertamina, as Pertamina has argued elsewhere.

express contractual allocation of the risk of loss. As the Tribunal pointed out, the risk of loss was rational based on Pertamina's close relationship with the Indonesian Government.

Pertamina accordingly has not satisfied its burden to show that the Final Award offends the "most basic notions of morality and justice." Enforcement of the Final Award is not contrary to United States public policy.

V. *CONCLUSION AND ORDER*

Pertamina did not waive its right to assert the defenses established by the New York Convention in this case, but has failed to meet its burden of proof on any of its asserted defenses under the New York Convention. The Court finds that the arbitration was not contrary to the contractual agreements of the parties; Pertamina was not denied due process in connection with the arbitration proceeding; and the Final Award does not violate United States public policy. In addition, the Court concludes that Pertamina's request to be allowed to conduct discovery in this enforcement proceeding is without merit. It is therefore

ORDERED that KBC's Motion for Summary Judgment Confirming Arbitral Award [Doc. # 14] is **GRANTED.**

The Court will issue a separate Final Judgment.

In accordance with the Memorandum and Order issued this date, it is hereby

ORDERED that Petitioner Karaha Bodas Company, L.L.C.'s ("KBC's") Motion for Summary Judgment is **GRANTED.** It is further

ORDERED that the Final Award in the Arbitration dated December 18, 2000 is **CONFIRMED.** Therefore, in accordance with the Final Award, KBC shall recover from Pertamina:

> (1) $111,100,000.00 for lost expenditures, plus interest at the rate of 4% per annum from January 1, 2001 until the date of full payment;
> (2) $150,000,000 for lost profits, plus interest at the rate of 4% per annum from January 1, 2001 until the date of full payment;
> (3) $66,654.92 for costs and expenses of the arbitration, plus interest at the rate of 4% per annum from January 1, 2001 until full payment.

Each party shall pay its own costs incurred in this proceeding.

APPENDIX I

THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, JUNE 10, 1958

21 U.S.T. 2517, 330 U.N.T.S. 3
(codified at 9 U.S.C. §§ 201-208)

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted at New York on June 10, 1958, the text of which is as follows:

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral

awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that,

if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension

of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the

International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this

Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a

statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceeding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

APPENDIX J

28 U.S.C. § 1367

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.